Supreme Court of the United States

OCTOBER TERM, 1947

No. 321

LELA MAE BENSON, ADMINISTRATRIX,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS, AND SUPPORTING BRIEF.

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WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Harwood-9350

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Lela Mae Benson, Administratrix of the Estate of Alfred G. Benson, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the decision and judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, rendered and entered on the 22nd day of November, 1946 (R. 44-55), in the case lately pending in said court, styled *Lela Mae Benson, appellant, v. Missouri-Kansas-Texas Railroad Company of Texas, appellee,* being No. 13743 of causes on the docket of said Court of Civil Appeals, affirming the judgment of the District Court of Dallas County (the trial court) in favor of said railroad company, defendant in said District Court and appellee in the Court of Civil Appeals and respondent herein, and

adjudging the costs of such appeal against the appellant in said cause, petitioner herein, which judgment of said Court of Civil Appeals became, and is, the final judgment of the highest court in said State of Texas to which petitioner can appeal; and petitioner has exhausted all of her remedies and been denied relief by the highest court in said state, in this:

That the charge of said trial court was by way of submitting to the jury certain interrogatories to be answered by them, called special issues, and upon the return by the jury of their answers (which, with the issues will be hereinafter shown) petitioner filed her motion for judgment on said answers; or, in the alternative, if certain of said answers should be found to be in irreconcilable conflict, then for a mistrial, and respondent filed its motion for judgment upon said answers, without waiving its motion, seasonably made at the trial, for a peremptory instruction in its favor, which motion was overruled.

But the trial court entered judgment in favor of respondent upon the issues and answers so made, and after a motion for a new trial had been seasonably filed by petitioner, and had been overruled by said trial court, petitioner, in the manner and within the time required by the laws of said state, and the rules prescribed in the premises, duly appealed her cause to said Court of Civil Appeals, which was received on the 3rd day of June, 1946, and properly docketed and in due order heard, following which, and on the 22nd day of November, 1946, said Court of Civil Appeals rendered its judgment and decision, affirming the

judgment of the trial court, and denying petitioner the relief sought in her said appeal.

On the 7th day of December, 1946, and within the time required by law and the rules of said court, petitioner duly filed her motion for rehearing in said Court of Civil Appeals which, on the 24th day of January, 1947 (R. 55), was overruled by a written opinion of said court. Petitioner on the 8th day of February, 1947, and within the time required by law and by the rules of said court, filed her second motion for rehearing and for additional findings of fact which on the 21st day of February, 1947, was overruled.

That the Supreme Court of Texas has jurisdiction, by writ of error, to review the decisions of said Court of Civil Appeals, and petitioner, upon the overruling of her said second motion for rehearing and the filing of said written opinion by said Court of Civil Appeals, on the 21st day of March, 1947, and within thirty days from the order overruling said second motion, as required by law and the rules of said court, filed her petition, praying for a writ of error from said Supreme Court to said Court of Civil Appeals (R. 56) and praying for a hearing by said Supreme Court to correct the many errors committed by said Court of Civil Appeals and the trial court, and to set aside the order and judgment of said Court of Civil Appeals and said trial court, and thereupon to enter judgment in favor of plaintiff (petitioner) upon the findings of the jury in the trial court; or, in the alternative, to reverse and remand said cause and to accord to petitioner a new trial of the same.

But said Supreme Court, upon consideration of appellant's petition for such writ of error, on the 7th day of May, 1947, denied the same, declaring and holding that the record showed "no reversible error." (R. 74.)

Your petitioner thereupon, and on the 17th day of May, 1947, within fifteen days from the date of the order of said court denying her petition, duly filed her motion in said Supreme Court, praying for a rehearing of her petition, and praying that the order of said court denying the same be set aside, and that her petition for writ of error in said cause be granted.

But said Supreme Court, on the 25th day of June, 1947, by its order then made and entered in the minutes of said court, overruled and denied said motion. (R. 74.)

Whereupon the judgment of said Court of Civil Appeals became final, and said Court of Civil Appeals is, as aforesaid, the highest court within said state to which petitioner can present her cause, and having exhausted all of her remedies in the courts of said state, she now presents to this court this, her petition for certiorari.

DECISION AND JUDGMENT OF THE COURT BELOW

The final decision and judgment of said Court of Civil Appeals is shown at pages 44-55 of the record and is reported in Vol. 200 at Page 233 of the Southwestern Reporter, Second Series, the order and written opinion overruling the motion for rehearing and adhering to the original opinion appearing at Page 241 of said volume.

It is believed by petitioner that this opinion, within and of itself, with its discussion of the issues and analysis of the evidenee, and the conclusions reached, discloses a complete misunderstanding of the nature of the case before the court, ruled as it is by the Federal Employers Liability Act and the doctrine of comparative negligence; that it shows a misunderstanding and misconception of the questions of law in the case, and the special issues submitted to the jury and their reply thereto, failing to construe the issues and the answers in the light of the case presented, and in the light of the record, and the decisions of this court in dealing with a case arising under the Federal Employers Liability Act, involving Federal questions, Federal policy and Federal decisions, and that said Court of Civil Appeals, through lack of full appreciation and understanding of such policy and decisions under said act, and of the rights and obligations of employer and employee, and particularly as they are defined by this court, has committed errors and deprived petitioner of her right and remedy under a Federal statute, intended to be for her benefit and protection, and her right to a jury verdict, and the benefit of a jury finding, and that the injustices of said decision can now be corrected only on review by the court to whom this petition for writ of certiorari is addressed.

Said court, as we believe the record, and the opinion itself, will disclose, has not given consideration to all of the facts in evidence upon the trial, but has based its decision upon part of the evidence and rejected relevant, pertinent and probative facts, inferences and conclusions in

the record, and favorable to plaintiff, and substantially supporting her case.

It has, in declaring petitioner's evidence presented no issue of fact, adopted a construction of the evidence and the reasonable inferences, deductions and conclusions to be drawn therefrom, in a light most favorable to respondent and most unfavorable to petitioner, reversing the rule universally obtaining wherever the existence of a jury question is in issue.

It has arbitrarily refused to give consideration to pertinent, relevant and probative facts, circumstances, inferences and deductions favorable to petitioner, and substantially supporting her theory of the case, and the findings of the jury when properly construed, and decided the case, not as involving the Federal Employers Liability Act and the doctrine of comparative negligence, and the decisions of this court, but, after the case had been tried on that theory, has arbitrarily rejected the findings of the jury responsive to such theory, and adopted the theory of the common law, failing and refusing, as did the trial court, to interpret the issues submitted to the jury and the findings of the jury thereon, in the light of the admitted character of the case, the language of submission and the answers, and the ordinary meaning of words of common use; and has erroneously disregarded and rejected the evidence of petitioner, consisting of facts, circumstances and inferences relevant and of probative force, and supporting her theory of the case; accepting, as conclusive, evidence of a contrary theory in favor of respondent, upon facts of less value and holding outright that the evidence of petitioner did not present

an issue of fact, in effect resolving every fact and every legitimate inference against her.

In the first division of its opinion in which it has, erroneously as we believe, interpreted the issues submitted by the trial court, and the answers of the jury thereto, it has found facts, in particular as to distances upon the ground (R. 48), which contradict and conflict with its findings as to such distances in the second division of said opinion (R. 54), wherein it sustains the assignment complaining of the failure of the trial court to direct a verdict at the close of the testimony "if necessary to a disposition of appeal."

In the first part of said opinion it finds that the distance between the west switch points and the cattle-guard is 366 feet (R. 48), and in said second part it finds that the distance is 418 feet. (R. 54.)

It erroneously states (R. 54, page 241 of 200 Southwestern Reporter, 2nd Series) that no definite measurement placed the body of deceased, when found, closer than 65 to 75 feet west of the stock-guard, referring to the testimony of Keel, obviously, as "definite," when in fact it was shown by his own testimony (R. 25-26) to be of little value even as an estimate.

It frankly rejects the testimony of Stitzel, the engineer, which, as stated by the court, placed the body "at or near a cattle-guard." It rejects the testimony of McNeil (R. 19) (who did not see the stock-guard) (R. 20) that the engine

stopped two or three car lengths east of the clearing point or about 300 feet east of the west switch stand; that the engine was 75 feet long and that he found the body according to his statement some 18 feet east of where he and deceased sat at the gangway of the engine.

It rejects the testimony of the witness Busby, the fireman (R. 29) that, when they stopped the first time, it was about three car lengths east of where the cars clear, approximately three car lengths in the clear. That the next westward movement (R. 28) was about half a car length; that the body of deceased (R. 29) was found about two car lengths back of the engine, as it had stood after moving forward about a car length.

It disregards the answer of respondent itself, to the effect that the engine when stopped was some 300 feet east of the west switch points. (R. 10.)

It presents the theory that deceased was struck and killed by the eastbound train, to support which it has rejected all of this testimony and these circumstances, and supplied inferences without probative value, or at least of less probative value, than the facts and circumstances supporting petitioner's theory, and has actually changed its findings as to distances upon the ground, and this notwithstanding the fact that the evidence acquitted the eastbound train of any connection with the death, it showing no evidence of blood or tissue or shred of clothing when examined an hour after the accident; and all plainly showing that the Court of Civil Appeals wholly failed to understand or to appreciate the effect of the evidence in the case.

NATURE OF CASE AND SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action at law under the Federal Employers Liability Act (Title 45, U. S. C. A. Sec. 51, et seq.), instituted by petitioner (plaintiff) against Missouri-Kansas-Texas Railroad Company of Texas, respondent (defendant), to recover damages for the death of her husband, Alfred G. Benson, which occurred on the 2nd day of August, 1945, while he was employed by respondent as head brakeman on one of its trains moving in interstate commerce, and in furtherance of that business of respondent, a common carrier by railroad, his death occurring at the station of Lindsay in Cooke County, Texas.

The suit was instituted by petitioner in a District Court of Dallas County, Texas, and by her pleadings in the trial court (R. 1) she invoked the provisions and protection of the Federal Employers Liability Act, expressly pleading that at the time of her husband's death he was employed as such head brakeman, and that he and the defendant at said time were employed and engaged in interstate commerce within the meaning of said act.

She alleged a number of acts and omissions constituting negligence, which resulted in the death of her husband, which included the negligence of the engineer of his train in starting the same without notice, and in starting the same with insufficient notice, and also the insufficiency and unsafe condition of the track, roadbed, works and ways where deceased met his death. (R. 3.)

She alleged that this space was rough and uneven, overgrown with grasses, weeds and vines, and that defendant had failed to provide a reasonably safe place for deceased to perform his work. She also alleged that within this space was a stock-guard or cattle-guard extending entirely across the same, and about 8½ feet in length, composed of spikes or spines pointing upward, which likewise had been so covered and concealed by such vines as to be impossible of discovery upon ordinary observation, and that deceased, while in and about the performance of his duties, stepped or stumbled into the same, and was thrown and caused to fall to his death. (R. 6.)

Respondent answered by a general denial and a special pleading denying any act of negligence upon its part, and claiming that no one knew how deceased had met his death, but if from negligence, it was his own negligence which was the sole cause of his death. (R. 8.)

The court submitted the case to the jury upon interrogatories or special issues, as provided by the Texas Rules of Civil Procedure. (R. 35,)

Respondent (without waiving its request for an instructed verdict), requested Issues Nos. 1, 2 and 3, as to the negligence of deceased in failing to place himself in a position of safety. (R. 31-33.) These requests were refused by the court, but the issues were given in their exact language in the Court's Issues Nos. 5, 6 and 7. (R. 38-39.)

Respondent's Requested Issue No. 4 was: "Do you find that such negligence, if any you have found in answer to the foregoing Issue No. 3, of the deceased, in being between

the tracks at the time of his death, if you have so found, was the sole proximate cause of his death, as that term has been hereinbefore defined to you," which was refused, and the court gave his Issue No. 8 (R. 39) instead: "Do you find from a preponderance of the evidence that the action of deceased, A. G. Benson, in being between the main track and the passing track at the time of his death, if you so find, was negligence, as that term has been hereinbefore defined to you?" And following which he submitted: "If you have answered the above issue 'yes,' answer the following, otherwise do not answer same: "Issue No. 9: Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the foregoing Issue No. 8, was the sole proximate cause of the death of A. G. Benson, as that term has been hereinbefore defined to you?" The jury answered No. 8 in the negative, and No. 9 was not answered. (R. 39.)

Included in the issues requested by respondent is Issue No. 12, submitted by the court, such issue being in the exact language of respondent's Issue No. 8. (R. 34.)

No objection or exception by either party to the charge of the court or to the issues or interrogatories as submitted by the court, or to the refusal of the court to submit any issue, is presented by this record.

The court submitted interrogatories or special issues to the jury with respect to the alleged negligence of the deceased's engineer in starting his train without notice, and in starting the same without sufficient notice and with reference to the negligence of respondent in respect of the

condition of its roadbed and the space or way between its main line and passing track. (R. 36-43.)

The jury found in favor of respondent as to the negligence of the engineer in both of the respects alleged, so that the question here presented has to do with the interrogatories or issues presenting negligence as respects said roadbed, the answer of the jury thereto, the proper construction of such answer, and the finding of the jury with respect to the negligence of deceased and the concurring negligence of deceased and respondent; and the holding of the court that no issue of fact was presented by respondent's evidence showing a causal connection between the condition of the roadbed as respected the stock-guard and the death of deceased.

In response to the first issue the jury found that in the early morning of August 2, 1945, Alfred G. Benson, at the time of his death, was in the performance of his duties in connection with the operation and movement of the westbound train upon which he was brakeman. (R. 36.)

In response to the second issue they found that the defendant, its agents or servants, was guilty of negligence in the manner of laying out and maintaining the main line and passing track and the area between the same, where the deceased, Alfred G. Benson, was performing his duties. (R. 37.)

Issue No. 3 submitted to them was in this language: "Do you find from a preponderance of the evidence that such negligence of the defendant, if any, was the direct and

proximate cause of the death of Alfred G. Benson?" To this they answered "No." (R. 37.)

Answering Special Issue No. 4 they found the damage to plaintiff on account of the death of her husband to be $37,030.00. (R. 37.)

In response to Special Issues Nos. 5, 6, and 7 they found that Benson failed to place himself in a place of safety at the time he met his death; that this was negligence, and was a proximate cause or proximate contributing cause of his death. (R. 38-39.)

They also found that his being between the main track and the passing track at the time of his death was not negligence. (R. 39.)

They found that his death was not the result of an unavoidable accident. (R. 40.)

Issue No. 12 with the answer of the jury was as follows: "What percentage of negligence, if you have found such negligence on the part of the defendant, proximately contributed to cause the death of the deceased? Answer from a preponderance of the evidence, as you find the facts to be, in percentage." (60%.) (R. 40.)

"In connection with the above issue you are instructed that the term 'proximately contributed to cause' means a concurrent act or acts of negligence on the part of both the deceased and defendant which proximately caused his death, if you so find that both parties were negligently responsible." (R. 40.)

Petitioner filed a motion that judgment be entered in her behalf upon these findings of the jury in the sum of $22,-218.00, 60% of $37,030.00, being the proportion of negligence found by the jury to be attributable to respondent, resulting in the death of deceased, claiming that the answers to Issues Nos. 1, 2, 3 and 12 were consistent, and entitled plaintiff to a judgment in such sum, or if they were not consistent, then the answer to No. 12 was in irreconcilable conflict with the answer to No. 3, and the case should be remanded. (R. 43.)

Respondent filed a motion for judgment on the verdict, and this motion was granted, and judgment rendered for respondent and against petitioner. (R. 43.)

Petitioner filed motion for new trial (R. 44), which being overruled, she appealed to the Court of Civil Appeals.

The Court of Civil Appeals affirmed this judgment upon theories and conclusions which will be more particularly noticed, and in addition held that the trial court should have instructed a verdict in favor of respondent at the close of the evidence, since the plaintiff's evidence was insufficient to present a question of fact. (R. 53.)

This makes it necessary to present and call to this court's attention the evidence in this case, and to extend this statement beyond what would ordinarily be required.

The main line of the defendant's road at the station of Lindsay is straight and runs substantially east and west, and the passing track is parallel to the main track and

about 8 or 9 feet from it, to the south. (R. 16.) The station at Lindsay is a "flag" station, but is also a time card station, (R. 16) where these numbered trains meet every night (R. 16), and immediately west of the stopping point is a gravel road crossing the tracks at right angles. Further west is another gravel road which is the "gravel road" referred to in the main in the testimony of the witnesses, which also crosses said tracks at right angles.

Four hundred fifty-eight feet west of this gravel road (R. 20) is the east edge of the stock-guard or cattle-guard, which is 8½ feet long, and lies across both tracks, the type of guard on the main line being composed of thin parallel bars extending parallel with the track and outside the ties. The type of guard between the two tracks consists of parallel steel slabs cut through in triangles, with the apex of the triangle pointing upward, and forming a nest of spikes or spines across the entire distance between the passing track and the main track. These bars are 8 or 8½ feet long, flattended at the ends, resting upon heavy timbers. [R. 24, and see Exhibit 15. (R. 78.)]

One hundred fifty-three feet west of the west edge of this stock-guard is a tie in the passing track, the outer or south end being painted white, to indicate what the witnesses call the "clearing point." That is, the point where the switch track begins to curve inward to the main line. (R. 20.)

Two hundred thirteen feet west of this clearing point are the west switch points or the switch target. (R. 20.)

These measurements were made by plaintiff and shown by her testimony, and are the same measurements found by the Court of Civil Appeals in the first part of its opinion. (R. 48.)

The defendant's witness Cornell testified that the distance from the stock-guard westward to the switch points or target is 418 feet, and *this* (R. 22) distance is used by the Court of Civil Appeals in the second part of its opinion, holding that petitioner's facts were insufficient. (R. 54.)

It was undisputed, and in fact was pleaded by respondent (R. 16), that the train upon which deceased was head brakeman, was under orders to proceed westward to the station of Lindsay, and there take siding and wait for and meet the eastbound train. That these orders were received at Whitesboro, and read by all the members of the crew, including deceased. That pursuant thereto, the train, which arrived at the siding at 2:30 a. m., pulled on to the same, deceased lining the switch for that purpose.

That deceased was an experienced brakeman and understood the orders. That his eyesight and hearing were good. That when last seen, some ten or fifteen minutes before the arrival of the eastbound train, he was in full possession of all his faculties, and was sober and alert.

W. T. McNeil, petitioner's witness, testified to these facts. He also testified that the westbound train stopped two or three car lengths in the clear of the west switch, about 300 feet east of the west switch stand. (R. 19.) That when the train was in this position he and the conductor alighted, and proceeded westward inspecting the train, and

about one-quarter of the way eastward from the engine they met deceased, also engaged in such inspection, that being the duty of the crew under the circumstances.

That deceased turned and went back with McNeil and the conductor to a point opposite the gangway of the engine, the conductor getting into the engine and McNeil and the deceased sitting on the south rail of the main line and smoking cigarettes (R. 18); and fighting mosquitoes. (R. 11.) That after some little time, and about fifteen minutes before the arrival of the eastbound train, the witness climbed into the "cabin," a place on the tender of the engine reserved for brakemen, thus placing all of the crew except deceased in the engine or the cabin on the tender. (R. 18.)

That, when the caboose of the eastbound train passed the westbound train, he went down in the deck of the engine with the engineer, going over the tender. He asked the engineer where the brakeman was. The engineer said "wasn't he with you?" He replied, "No," and said 'Stop and let's find him." That the engineer had started just as soon as the caboose passed, and moved westward mighty slow, about two miles an hour, a car length or a little better. He stopped immediately when the witness said "Stop, let's find him." (R. 19.)

That the witness went back along the side of the train toward where the engine was, walked back just a little, and found deceased. He estimated from 15 to 18 feet from where they had been sitting. He was lying on his right side, with his body sort of parallel with the rails, entirely clear of the main line and the rail of the passing track. A

little back of his right eye, the witness could see a spot of blood; his head was toward the east. (R. 19.)

Fred Stitzel, the engineer, was offered as a witness by plaintiff. He testified as to the movement of the train from the time it was made up until it entered the passing track; and as to the orders, and deceased's understanding of them, practically as did the witness McNeil.

He said that when he pulled into the siding he stopped his engine about two car lengths east of the clearing point, identified by a white tie, and that a car length is about 45 feet. (R. 20.)

That after the eastbound train had passed and after signaling he moved his train forward or westward to a point just clear of the main line, moving approximately 60 feet when he stopped and inquired of the rear brakeman as to the whereabouts of the head brakeman, Benson. They got off the engine and went back to look for deceased, and found his body about two car lengths east of where he had originally stopped his engine, which was two car lengths east of the clearing point. (R. 20.)

Plaintiff testified to the measurements hereinabove set out, her testimony being uncontradicted, except she testified that the total distance from the west edge of the stock-guard to the west switch point was 366 feet (153 feet to the clearing point and from there 213 feet to the west switch points), while defendant's witness Cornell testified that the distance was 418 feet.

She said that on September 5, following the death of her husband on August 2, she was at the place of the accident, and that the area between the main line and the passing track was grown up with weeds, grass and vines, from knee-high to waist-high, completely covering the ground.

That she walked from the gravel road west in said area, looking carefully as she walked, and did not discover the cattle-guard until she stepped into it, not knowing of its existence until that time. That it was completely covered with grass. (R. 21.) In this connection she identified Exhibits Nos. 3 to 7, inclusive (appearing at R. 76), as showing the area looking east from a point west of the west switch point or target, to and across the gravel road. She identified Exhibits Nos. 11, 12, 13 and 14 (R. 77) as showing pictures of herself taken from different angles as she stood within the stock-guard before the grass was cut. She said that Exhibit 15 (R. 78) is a picture of that portion of the stock-guard on the main line, showing its type, and within the area between the main line and the passing track, and showing its type, taken after the grass and weeds had been cut. (R. 78.)

That when her husband left home on the 17th of July, preceding his death, to take a run out of Denison, his shoes were new. She identified the shoes introduced as exhibits, the right with the heel and rear part of the sole wrenched or torn loose from the upper part, and also his trousers, which were cut into strips, as with a sharp instrument, from the waistband to a point opposite the thigh. She iden-

tified the shirt which he wore, and which showed a large hole below the right shoulder. She said there was a cut in the temple of deceased, just to the rear of the right eye, about an inch long. That her husband weighed 175 pounds. (R. 21.)

W. S. Moore testified for petitioner, stating that on the 31st of August, following the death of deceased on the 2nd, he examined the passing track and the area or way between it and the main line, and that the grass between the main line and the passing track was anywhere from knee-high to waist-high, and there were vines, he would call them gourd vines, all over the different places, and other vines. That there were piles of dead grass, and the grass had come up between like they had been there for some time. The grass had grown up through those piles. The ground was ridgedy and uneven. (R. 21-22.)

He identified Exhibits Nos. 3 to 7, inclusive (R. 76), as pictures of the area made on the 31st of August, 1945, No. 3 being taken with the camera west of the west target, and looking eastward; No. 4, with the camera at a point about 50 steps east of said first point; No. 5, with the camera about 50 steps east of the last named point, and so with No. 6 and No. 7. He identified No. 5 as showing his position standing in the areaway at the stock-guard. (R. 22.)

Rule 84 (a), in effect at the time provided:

> "Enginemen of freight trains must, when practicable, get a proceed signal from the rear end of the train before passing any station or side track that is designated on time table." (R. 22.)

A. L. Cornell, defendant's witness, testified that the distance from the west edge of the cattle-guard to the west switch point of the west switch was 417 feet, 8 inches. That a train of 31 cars (the number in the westbound train), stopping with the engine as much as 300 feet east of the west switch point, would extend eastward across a public road—the gravel road. That when a train stops across a public road, it is the continuing duty of the persons in charge of it to take note of any passing, or any possible passing, on that public road, so as to be at all times ready to cut the train if somebody comes up to cross it. (R. 23.)

He did not think a switch frog or a guard rail would catch a man's foot, and that the frog and the guard rail in this case were far in advance of the clearing point. He saw nothing else, there, that might catch a man's foot. He did not think the cattle-guard would be calculated to catch a man's foot. (R. 23.)

Defendant's witness, E. T. Lytle, testified that he was at the place of deceased's death in the forenoon, about eleven o'clock on the morning he was killed. He made a thorough examination of the area between the main line and the passing track. At a point 330 feet east of the west switch point, and that distance less 90 feet from the guard rail, the grass had the appearance of a heavy object having been dragged over it—mashed down. This began at the south side and near the south rail of the main track, and extended southeastwardly a distance of 24 feet, where it appeared that a heavy object had rested for some time. He saw no other such disturbance between the tracks. The

main line was ballasted with gravel. He found no obstruction on the premises. The ground was fairly level. There would possibly be waves in the depression, but no abrupt changes in elevation. There was Johnson grass and some native grass. The grass between the tracks was hardly knee-high, probably 16 inches. (R. 23.)

The grass in plaintiff's Exhibit 3 seemed higher than it was on August 2. It was 354 feet east of the west switch point to the point where the disturbance of the grass stopped. From this point eastward to the cattle-guard was 64½ feet.

He saw a pair of work gloves that had been placed across the south rail of the main line, and they had been cut in two by a passing train, the ends being on either side of the rail. This was about 3 feet west of the beginning of the disturbance of the grass. He found cigarettes and a container package and a small box of matches scattered, and a comb and pencil. The comb and pencil were within the last 5 feet of the disturbance. The cigarettes and matches were scattered along over the entire 24 feet. He found cigarette stubs, which were scattered between the point begining 330 feet east of the west switch point and the point where he saw the gloves had been cut in two. (R. 24.)

On cross examination he said that the slabs in which had been cut the triangles were about 8½ feet long and 3/32-inch thick, and that their ends rested on a timber about the size of a cross tie and 8 or 10 feet long. (R. 24.)

He did not know how many people had been at the point where the grass was mashed down between the time the

man was killed and the time the witness got there. There should be five men in a train crew, and if one was dead that would leave four.

He did not know whose gloves it was that he saw cut in two. He did not know whether they were McNeil's gloves. He did not know whether the cigarette stubs came from McNeil's cigarette package or the package of deceased, nor whether McNeil and deceased sat at this point for some time and smoked cigarettes. He saw no large rocks or clinkers at this point. (R. 24-25.)

If the engine was sitting 300 to 325 feet east of the west switch point, the frog and guard rail would be many feet west of the engine, and he didn't think that would catch a man's foot. (R. 25.)

If there was no support under the steel slabs with the triangular spines, and a man weighing 175 pounds should step upon it, it would have a tendency to sway or depress under his weight. (R. 25.)

Examining the shoe (plaintiff's Exhibit 20), he said the heel and the sole that the heel is attached to are torn loose from the upper part as far as the heel goes. The heel was tacked on with about eighteen pegs. He would think it would take considerable force to pull it loose. If a man stepped into a place like that (Exhibit 15), and fell to one side, the pressure would be on the side, and the pull would be to the side. It would exercise pressure on the heel if it was wedged in the cattle-guard. (R. 25.)

That the brake beam on a box car is approximately 18 inches above the rail or less; and the journal is outside the wheel, and covers the axle on the end outside the rail and above the ties approximately 16 inches above the rail. (R. 25.)

The witness assembled the various things that he picked up at the point described, and put them in a box in a container, and they were all put in the motor car in which he went to the place of the accident. He did not take them out. Mr. Sullivan and Mr. Morrison were in the motor car, and if either got them out it was perhaps Mr. Sullivan, the claim agent. (R. 25.)

Mr. Sullivan took pictures of the track from different directions east and west, but the witness could not say what position when each picture was taken. (R. 25.)

A train standing on the side track in the position of deceased's train would be across the gravel road. (R. 25.)

At the trial respondent produced neither the gloves nor any of the other articles described, nor the pictures.

Vernie Keel, respondent's witness, was the undertaker who picked up the body of deceased. He said the left leg was broken about halfway between the ankle and the knee. The skull was fractured, the fracture being about two or three inches. That it appeared to be a break, a blow; that his neck was broken about the third vertebra from the shoulder; that practically all of the ribs on the right side were broken and the right shoulder. He signed the death certificate, giving the cause of death as "penetrating and crushing injury right parietal region."

He stopped his ambulance at the gravel road, and walked westward to where he found the body of deceased, which was lying, not under the wheels, but under a box car of the westbound train, with the head to the east in a more or less crumpled position, the shoulder lying under the edge of the westbound train and in the space between the tracks. He estimated the distance of the body from the cattle-guard at 65 or 75 feet and to the west. (R. 25-26.)

This witness also estimated the distance from the gravel road west to the cattle-guard, shown to have been 458 feet by actual measurement, as 300 or 400 yards. (R. 26.)

H. J. Morrison testified for defendant substantially as did the witness Lytle with reference to the articles found and picked up at the point where Lytle testified the grass had been mashed down. He said: "We put them in the motor car and carried them in. They laid in the motor car that night," and the witness took them to Mr. Sullivan's office next morning. (R. 26.)

Cross examined, he said Mr. Sullivan made pictures at the point of the accident of the whole track, the west end there looking east and west. He believed Mr. Sullivan was standing between the tracks when the pictures were taken. Mr. Sullivan took a picture of the comb. He did not remember a picture of the cigarette package. They were all there together, and the witness supposed he got the package. He took a picture of the bunch of things. The witness saw nothing there that looked like it might have caught a shoe heel and left it in the condition of Exhibit 20. If Exhibit 15

was between the rails, and a man stepped into it and fell it might do that to the shoe. (R. 26.)

He testified that the grass in plaintiff's Exhibit 12 and in Exhibit 5 appeared to be a lot more than on August 2. (R. 26.)

Respondent offered the deposition of B. H. Wagner, the conductor of the westbound train. His testimony as to the point where the engine of the westbound train stopped after entering the siding was that it was 2 or 3 car lengths in the clear, and 300 to 325 feet east of the west switch point. (R. 27.)

He said after the caboose of the eastbound train passed, the westbound train was moved forward a car length or two, and the witness lined up the switch for its passing on the main line. (R. 27.)

The train was not moving, and he went back to find out what was the matter, and found that deceased was missing. Deceased should have been up at the switch to open it. The witness went with the rear brakeman, who found the body lying between the two tracks. It was somewhere in the neighborhood of two pole lengths east of the west switch, a pole lengths being somewhere between 170 and 175 feet. He would say it would be somewhere around, approximately, about 300 or 325 feet. (R. 27.)

Deceased was not at the frog nor at the guard rail when picked up. The witness, after learning deceased was missing, went back to the tender to see if he was in the cabin. He could see McNeil's lantern about 2 or 3 car lengths

where he was walking in an easterly direction, and the witness had gone about 2 car lengths, when McNeil called that he had found the body. At that time he was about 5 or 6 car lengths, maybe less, from the witness. The deceased was breathing when he was reached by witness and McNeil, but was unconsicous. The only mark of injury the witness saw was a little mark of blood near the right side of the mouth. The witness was at the point of the accident on the 2nd of October, 1945, and found conditions there about the same as they were on the night of the accident. (R. 28.)

Defendant offered the testimony of B. F. Busby, fireman on the westbound engine.

After the eastbound train passed, he opened his oil valve a little bit, stepped down in the deck to where he could see the color of his fire, and got back on the seat box, waiting for the switch to be lined. The engineer asked if the head brakeman had lined the switch, and the witness told him "No, not yet," and so the conductor went and lined the switch. They had moved approximately half a car. This movement took place after the caboose of the eastbound train was perhaps three-fourths out of the way of the passing track. The witness did not recall whether the movement was before or after the conductor lined the switch, but did recall they had moved about half a car length, and stopped. He believed the engineer moved up just a little ways, and asked if the switch had been lined. Being told that it had not, he asked where the brakeman was, and the witness said, "I don't know, I don't see him on my side," and the engineer said, "well, let's find him. He may be back in the

deck house asleep." And then McNeil came over, and what further transpired, the witness did not know. (R. 28.)

There is a cattle-guard, he said, between the west switch points and the gravel road—somewhere around 100 yards west, maybe a little farther—and it must have been somewhere around 3 or 4 pole lengths east of the west switch point. He said they found the body of deceased about two car lengths back of the engine as it stood after it had moved forward about a car length. (R. 29.) "When we stopped the first time, we stopped about three car lengths east of where the cars cleared there, approximately three car lengths in the clear. I might be mistaken in the estimate of three car lengths, it might be six, but I don't think so." (R. 29.)

Defendant offered the testimony of J. F. Glover, the engineer on the eastbound train. He had a "wait order" at Lindsay at 3:15 a. m. for the westbound train 381, witness' train being 372. They were both freights and time-card trains. He arrived at the meeting point at 3:15. There is another road crossing after you cross the first road east of the west switch. The main line is straight west of the switch target, around 25 poles. It is 175 or 180 feet from one pole to another. There would be a mile and half of straight track between curves. Going east on that track he was sitting on the right side of the engine, looking straight ahead. His headlight was perfect. The track was about level. He was watching ahead, watching his business. He saw nothing except the man standing in the passing track, winking his light, the engineer. He was going, he guessed, about 35 miles an hour, between 30 and 35. (R. 29.)

He said there was a little grass between the main line and the passing track. "Nothing else that I know of." (R. 29.)

He did not see anybody asleep on the track. He did not see Mr. Benson. Up to the moment he checked the headlight of the passing train, he was looking straight down the track on which his train was moving to the east. The headlight was sufficiently powerful that he could see any object down the track for half a mile or more; he saw nothing on the track. If there had been an object as big as a man on the track he believed he would have seen it.

His engine had a loud whistle, and about 3 poles west of the switch target he blew a long, loud blast. For the crossing signal he blew four times, two long and two short blasts. (R. 30.) The witness was working his throttle as he came around the curve at Lindsay, making a pretty good noise, and there was the noise of 57 cars. (R. 30.)

He heard no noise as he passed Train 381. When he got to Whitesboro, about an hour later, he heard through his conductor, Anderson, that a man had been found killed at Lindsay, and he made an inspection of his engine and train. It was just as close an inspection as he could make by light or torch, bending over good, and he found nothing. He looked at the pilot, the front end of the engine, the sides of the engine, and the train crew looked at the cars. He found no evidence of his engine having struck anything, no marks on the engine. (R. 30.)

As he passed Lindsay he did not see anything moving on or near the track. He saw nothing on the track or rails

between the engine and the east curve. He could see very plainly down to the beginning of the east curve, nearly two miles away. He could see well between the main track and the siding. (R. 30.)

A. F. Winkle, defendant's witness, testified that he was superintendent of safety and rules for the defendant.

The stock-guard in question was of standard construction, in use at the time of its installation and at the time of decedent's death, both the type on the main line and that between the main line and the passing track. Asked: "Suppose the grass had been cut and accumulated into piles, and Johnson grass and weeds and vines had grown up through those piles and anchored them on the ground, would you consider that a safe passage," he answered, "Not if there was something that would cause a stumbling hazard." (R. 30.)

This witness, over the objection of petitioner, that the question called for a conclusion as to the ultimate fact, and invaded the province of the jury, and over the motion of petitioner, to exclude his answer, when made, as showing inapplicability to the facts, testified respecting Rule 84(a) "The meaning of the word 'practicable' in the rule is that long freight trains around curves, where the engineman can't see a signal from the rear, why he is permitted to proceed without the signal until such time as the engine of the train gets on straight track, and he can get the signal. That the purpose of the rule is for trains in motion on the main track, in case the conductor or rear brakeman should see a hot box on the train, or have a brakebeam down, that

the engineman must get a signal before passing each station or side track, so that this signal that he receives from the rear end would indicate whether the conductor wants him to stop the train for any purpose or to continue on." (R. 31.)

JURISDICTION OF THIS COURT

The jurisdiction of this court is based upon Section 237 of the Judicial Code, as amended, and reformulated by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, Title 28, U. S. C. A., Section 344, providing that it shall be competent for this court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority, and with like effect, as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had on any title, right, privilege or immunity, especially set up or claimed by either party under the Constitution or any treaty or statute or commission held or authority exercised under the United States.

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and here sought to be reviewed, was originally entered on the 22nd day of November, 1946. On the 7th of December, 1946, petitioner filed her motion for rehearing in said Court of Civil Appeals, which was overruled by said court on the 24th of January, 1947, by written opinion of said court. On the 8th of February, 1947, petitioner filed her second motion for rehearing, and, in view of the contradictory findings of the Court

of Civil Appeals, as appeared from the opinion, her request for additional findings of fact. The motion as to both requests was overruled on the 21st of February, 1947. On the 21st of March, 1947, she filed her petition, praying for a writ of error from the Supreme Court to said Court of Civil Appeals, said Supreme Court having jurisdiction in the premises, and praying for a hearing by said Supreme Court to correct the errors committed by said Court of Civil Appeals and the trial court, and to set aside the order and judgment of said Court of Civil Appeals and trial court, and thereupon to enter judgment in favor of petitioner upon the findings of the jury in the trial court; or in the alternative, to reverse and remand said cause and to accord to petitioner a new trial.

On the 7th of May, 1947, said Supreme Court denied petitioner's petition, declaring and holding that the record showed "no reversible error."

On the 17th of May, 1947, petitioner filed her motion in said Supreme Court, praying for a rehearing of her petition, and the same was overruled on the 25th of June, 1947.

All of said proceedings were timely instituted by petitioner, were in proper form and in accordance with the rules of said court, and the effect of said rulings was to make the judgment of said Court of Civil Appeals the final judgment by the highest court in said state in which a decision could be had, and the proper court to which the writ of certiorari in this case, if granted, should be directed.

Bacon v. State of Texas, 163 U. S. 207, 41 L. Ed. 132-135;

Stanley v. Schwalby, 162 U. S. 255-282, 40 L. Ed. 960-969;

Adams v. Saenger, 303 U. S. 57-60, 82 L. Ed. 649-651;

Western Union Tel. Co. v. Priester, 270 U. S. 251-259, 72 L. Ed. 555-564 (where the point is annotated beginning at page 555).

Such decision being a decision of the highest court in said state, and involving Federal questions, it is reviewable by this court, as we believe, under the following decisions:

Ellis v. Union Pacific Railroad Company, Law Edition, Vol. 91, No. 7;

Lavender v. Kurn, 327 U. S. 645-654, 90 L. Ed. 916;

Bailey v. Central of Vermont Railway, Inc., 319 U. S. 350, 87 L. Ed. 1444;

North Carolina Railroad Company v. Zachary, 232 U. S. 248, 58 L. Ed. 591;

Grand Trunk W. R. Company v. Lindsay, 233 U. S. 44, 58 L. Ed. 838.

QUESTIONS PRESENTED

I.

1. The case being one admittedly based upon and ruled by the Federal Employers Liability Act, with its doctrine of comparative negligence, and the decisions of this court, construing and applying the same, and the facts showing, and the jury finding, that deceased, at the time of his death, was in the performance of his duties in connection with the operation and movement of the westbound train upon

which he was brakeman; that the defendant (respondent), its agents and servants, were guilty of negligence in the manner of laying out and maintaining the main line and passing track, and the area between the same, where the deceased, Alfred G. Benson, was performing his duties; that being between the main track and the passing track at the time of his death was not negligence; that the death of deceased was not the result of an unavoidable accident; nor due to a new and independent cause.

And the jury having found that the deceased failed to place himself in a place of safety at the time of his death, and was guilty of negligence, which was a proximate cause, or a proximate contributing cause of his death.

And having found in answer to Issue No. 3 that the negligence of respondent was not the direct and proximate cause of the death of deceased;

But, in answer to Issue No. 12, that the negligence of respondent proximately contributed to cause the death of the deceased to the extent of sixty (60%) per cent of the total negligence—

Whether such answers discharged respondent from liability and required judgment to be entered against petitioner, as was done by the trial court and approved by the Court of Civil Appeals.

II.

Or, in the situation above described, whether such answers fixed liability on respondent and required the entry of judgment in favor of petitioner for $22,218.00, being

sixty (60%) per cent of the total damage ($37,030.00) found by the jury in response to Issue No. 4.

III.

Whether the Court of Civil Appeals and the trial court were authorized under the record and the circumstances as above set forth to substitute for the jury's findings their own contrary findings, and thus, in effect, to deprive petitioner not only of findings favorable to her, but of the right to a trial by jury.

IV.

Whether the Court of Civil Appeals and the trial court, notwithstanding the case is one under the Federal Employers Liability Act, and was tried by the court and counsel and submitted to the jury by the court upon that theory, has decided it as if a case at common law, controlled by the common law doctrine of contributory negligence, rather than as controlled by the doctrine of comparative negligence, and by the decisions of this court, and thus deprived petitioner of the benefit of a Federal statute enacted for her protection, and deprived her of her constitutional right of due process of law and equal protection of the law.

V.

1. Whether the facts shown in this record with the inferences and conclusions fairly deducible from them constitute that substantial evidence required by the decisions of this court to make a jury question in favor of petitioner, and fairly raised the issue that the negligence of respond-

ent in respect to its roadbed and premises contributed to the death of deceased.

2. Whether the Court of Civil Appeals correctly held that petitioner upon the whole case at the close of the evidence had presented a case of mere speculation as regarded the cause of her husband's death, and that, therefore, the trial court should have instructed a verdict against her and in favor of respondent.

VI.

Alternatively, and in case the answers of the jury to Issues No. 3 and No. 12 are not consistent with each other, whether they are in irreconcilable conflict, leaving material issues undetermined, and that such findings should be set aside and a new trial awarded to petitioner.

REASONS RELIED ON

The reasons relied on for the allowance of the writ, as more fully presented in the accompanying brief, are:

I.

The action is brought under the Federal Employers Liability Act (45 U. S. C. A. Chapter 2, Section 51, et seq.), affirmatively invoked by petitioner in limine, it being admitted that deceased, on account of whose death the action was brought by petitioner, his surviving wife and administratrix, was, at the time of his death, within the provisions of said act, the evidence showing, and the jury finding, that he met his death in the area or way upon the premises of respondent, negligently maintained, while en-

gaged in the performance of his duties, in the operation and movement of respondent's train in interstate commerce.

The relevant facts and circumstances with respect to his employment and his death are set forth in petitioner's summary statement of the matter involved.

II.

1. That the case is one in which the state court has decided a Federal question of substance in a way not in accord with applicable decisions of this court [Rule 38, Paragraph 5(a)], as more particularly set forth (pages 28 to 30 of this petition) under "Questions Presented," and has (a) denied petitioner the rights guaranteed to her under the Federal Employers Liability Act, and by an erroneous and unauthorized construction of the issues submitted to the jury, and their replies thereto, has deprived petitioner of the effect of their answers favorable to her; (b) said court, by an erroneous and unauthorized construction of said answers (and by its unauthorized construction of the effect of the evidence) assumed the functions of the jury, and, beyond any authority vested in said court under the applicable decisions of this court, has found, and so declared, that respondent is entitled to a judgment upon the facts, notwithstanding the favorable answers of the jury in favor of petitioner, supported by substantial evidence.

III.

Because, after the case had been pleaded, tried, submitted and argued on the theory that it was controlled, and to

be decided, under the provisions of the Federal Employers Liability Act, and the applicable decisions of this court respecting the same, and after the issue of comparative negligence had been submitted to the jury by the trial court, as was required, the jury finding that respondent was guilty of negligence and deceased of contributory negligence, and that the negligence of respondent contributed and concurred to the extent of sixty (60%) per cent of the total negligence in causing the death of deceased, said state court, disregarding the theory upon which the case was tried, and disregarding said answers of the jury (as did the trial court), and applying the rule of negligence and contributory negligence as at common law, and refusing to apply the rules applicable under said Federal statute, and the decisions of this court, arbitrarily, and beyond any authority vested in said state court, declared and held, in effect, that the issue of comparative negligence was not submitted, Issue No. 12 being but a conditional issue, depending upon an affirmative answer to Issue No. 3, notwithstanding it was not made such by any language of the charge, the only condition as to said Issue No. 12, itself, being contained in said issue, which was complete, without reference to any other issue; and it will not be presumed that the jury intended to depart from the instruction contained in said issue when they answered that the concurring and contributing negligence of respondent was sixty (60%) per cent of the total negligence which resulted in the death of deceased.

IV.

Since the answer of the jury to Issue No. 3 did not acquit respondent of all negligence resulting in the death of deceased, but determined only that the negligence found in response to Special Issue No. 2 was not "the direct and proximate cause" of said death, and since Issue No. 12 contained the only definitions conditioning a finding of respondent's concurring negligence, it will be presumed that the jury had such conditions in mind, and did not depart from the instruction of the court, and disregard such instruction in answering that the negligence of respondent contributed and concurred to the extent of sixty (60%) per cent of the total negligence resulting in the death of deceased.

V.

The petition is one not only to appeal to the "sound judicial discretion" of this court, but to challenge it, if that discretion means "a liberty or privilege allowed to a judge within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case, and is discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law" (Black's Law Dictionary, second edition, page 375, quoted in Gaar, Scott & Company v. Nelson, 148 S. W. 417-421), because

1. The record, and the opinion of the Court of Civil Appeals, itself, show that said court was completely without understanding of the facts before it;

2. So much so, that its own findings of fact as to distances upon the ground were conflicting and contradictory (see page 237, column 2, of the reported opinion, where the total distance from the stock-guard to the west switch point is found to be 366 feet, and page 240, column 2, where the same distance is found to be 418 feet), the difference between said findings as to distance being a fact of vital importance.

3. The position of the body, when found, being important (but only in determining where deceased met his death), is differently placed by these contradictory findings, the first finding of 366 feet, and the testimony of Stitzel, the engineer (R. 48), as also the testimony of McNeil, the rear brakeman (R. 18), Wagner, the conductor, and Busby, the fireman (R. 27-28), placing the body in the immediate vicinity of the stock-guard, and the state court actually finding that such was the effect of Stitzel's testimony (which it rejected though unimpeached), whereas the finding of 418 feet, with the estimate of Keel (R. 26) places the body 64½ feet west of the stock-guard, and while neither finding is sufficient to conclude the petitioner, nevertheless the record in this respect is such as to call for a review by this court.

VI.

The record is such as to invoke the judicial discretion of this court for the reason that it affirmatively shows that the Supreme Court of Texas is not satisfied with the opinion of the Court of Civil Appeals, but has declined to review it for reasons not disclosed, and thus the record is

such as peculiarly to appeal to this court to hear the case and declare the law as determined by its own interpretation of the statute and in harmony with its own decisions.

VII.

The case is one to appeal to the judicial discretion of this court, because as will appear from the opinion of the Court of Civil Appeals, every question has been resolved against petitioner and every inference resolved against her, for example, syllabus 9, page 239, syllabus 10, pages 239-40, syllabi 11-13, page 240, and syllabus 14, page 240, all suggesting strongly that she has not had a fair trial and a day in court.

VIII.

Because, the state court has disregarded the plain and unambiguous meaning of the language of submission and the answers of the jury, submitted and made, in language of common understanding and plainly disclosing a finding in favor of petitioner, and embarked upon an expedition of surmise and conjecture, itself creating a question as to the meaning of the issues and the answers, and resolving the question against petitioner (see discussion at page 238 of the reported case); and further showing a complete misunderstanding of the authorities cited upon the meaning of the words "the direct and proximate cause," used in Issue No. 3, and holding that: "The instant facts are quite dissimilar to those present in El Paso Electric Company v. Sawyer" (291 S. W. 667, 298 S. W. 267), the Sawyer case (see column 1, syllabus 8, page 673) being cited merely to show that the Texas courts had construed the language

used in Issue No. 3 in accordance with the meaning of those words as declared by all of the lexicographers, and everywhere understood by men of common school education; expressly holding that the words "the proximate cause" and "the sole proximate cause" mean the same thing.

PRAYER OF PETITIONER

WHEREFORE, petitioner prays that a writ of certiorari be issued by this court, directed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, to the end that the decision and judgment of said Court of Civil Appeals in said cause, Lela Mae Benson, Administratrix, Appellant, v. Missouri-Kansas-Texas Railroad Company of Texas, Appellee, and being numbered 13743 on the docket of said court, be reviewed by this court, as provided by law, and that upon such review, said decision be reversed, and that petitioner have such other relief as to this court may seem appropriate.

Respectfully submitted,

HASSELL AND HASSELL,

By J. W. Hassell
Attorneys for Petitioner.

Charles K. Bullard
Of Counsel.

Supreme Court of the United States
OCTOBER TERM, 1947

No.....

LELA MAE BENSON, ADMINISTRATRIX,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Respondent.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS.

May It Please the Court:

In support of the foregoing petition for writ of certiorari petitioner, as permitted by the rules of this court, presents the following brief and argument.

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas will be called the "state court" and the Supreme Court of Texas, unless it otherwise appears, the "Supreme Court."

If emphasis is shown, it is supplied, unless otherwise indicated.

I.

The petition seeks a writ directed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas,

at Dallas, in the case styled Lela Mae Benson v. Missouri-Kansas-Texas Railroad Company of Texas, numbered 13743 on the docket of said court, and reported in 200 Southwestern Reporter, Second Series, at pages 233-241.

The Supreme Court denied an application for a writ of error, without a written opinion, but with the general statement "refused, no reversible error."

It is provided by *Rule 483 of the Supreme Court, as amended (Vernon's Texas Rules of Civil Procedure)*, that

> "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires a reversal, the court will deny the application with the notation 'refused, no reversible error'."

II.

The grounds on which the jurisdiction of this court is invoked have been specifically set forth in the foregoing petition. Briefly, they are that this court has jurisdiction under Sec. 237 of the Judicial Code, as amended, and reformulated by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 Com. App., Title 28, U. S. C. A., Sec. 344, as the question presented involves a right, privilege or immunity under the Constitution, and under a statute specially invoked in limine.

III.

The case is one under the Federal Employers Liability Act. It was heard, considered and submitted to the jury as such.

It was admitted that deceased's employment brought him within the protection of the act, and that he lost his life while engaged in such employment.

At the close of the evidence respondent filed a motion for a peremptory instruction in its favor, which motion was overruled, and the case was submitted to the jury upon special issues, the full charge appearing in the record (pp. 35-43).

In response to Issues Nos. 1 and 2 the jury found:

(1) "At the time of his death," (deceased) "was in the performance of his duties in connection with the operation and movement of the westbound train upon which he was a brakeman."

That (2) "the defendant, its agents and servants, were guilty of negligence in the manner of laying out and maintaining its main line and passing track, and the area between the same, where the deceased, Alfred G. Benson, was performing his said duties."

Issue No. 3, as submitted, was as follows:

> "Do you find from a preponderance of the evidence that such negligence of the defendant, if any, was the direct and proximate cause of the death of Alfred G. Benson?
>
> "The answer of the jury being 'No'."

In response to Issue No. 4 they found that the damage suffered by respondent was $37,030.00.

That deceased (5) "failed to place himself in a place of safety at the time he met his death."

"That such failure (6) to be in a place of safety at the time the deceased met his death was negligence."

That "such negligence (7) was a proximate or a proximate contributing cause of the death" of deceased.

That (8) "the action of the deceased, A. G. Benson, in being between the main track and the passing track at the time of his death," was not negligence.

They further found (10) that his death did not result from a new and independent cause; and (11) that it was not the result of an unavoidable accident.

They found in answer to Issue No. 12 that negligence on the part of respondent proximately contributed to cause the death of deceased in the proportion of sixty (60%) per cent of the total negligence. This is our interpretation of the language of the issue and the answer. It does not agree with that of the state court nor of respondent, and it thus devolves upon us to set out Issue No. 12, and the answer thereto in full as we have Issue No. 3, in order to bring them to the convenient attention of this court for interpretation, within and of themselves, and with relation to each other, and with relation to all of the other issues in the case, and their application to the facts, and the nature of the case.

Issue No. 12, with the answer of the jury, shown in parenthesis, is as follows:

> "What percentage of negligence, if you have found such negligence on the part of the defendant, proxi-

mately contributed to cause the death of the deceased? Answer from a preponderance of the evidence as you find the facts to be in percentage. (60%) In connection with the above issue you are instructed that the term 'proximately contributed to cause' means a concurrent act or acts of negligence on the part of both the deceased and the defendant which proximately caused his death, if you so find that both parties were negligently responsible."

The state court held, as did the trial court, that the answers to these issues constituted a verdict for respondent, and required the entry of judgment in its favor.

The petition alleged that respondent, in connection with the operation of its road, maintained yards, turnouts, switches, and so forth, and maintained ways and works, including a passing track, adjacent to and substantially parallel with its main line. (R. 2.) That it was necessary for trainmen, engaged in operating respondent's trains, and in inspecting the same, and moving them into and through its yard, and upon its main line and switch, and particularly its brakemen and conductors, to be in and upon said yard, and in and between the various tracks therein, and particularly the space between said main line and said passing track, and that it was the duty of respondent to use ordinary care to keep said space or way, and the surface thereof reasonably smooth and free from rocks, clinkers, weeds, grass, vines, trash and other impediments, and in a reasonably safe condition for the use of its said employees, including the said Alfred G. Benson, so that they might perform their duties with safety and dispatch. (R. 3.)

It alleged, using substantially the language in Title 45, U. S. C. A. Sec. 51, the negligence of respondent in the construction of its roadway, works and ways at said point, and in the use, maintenance, management and operation thereof. (R. 3-6.) That respondent failed to keep the yard and the works and ways, to be used by employees, free from obstructions, as was required for the reasonable safety of the employees.

That for a long time prior to the 2nd day of August, 1945, when deceased was killed, defendant and its officers, agents and employees, had permitted the rocks, stones, clinkers and piles of cinders to be in said yard and in the space or way between said main line and said passing track, so used and to be used by its trainmen, and had permitted the surface to become rough and uneven which, with the accumulations and obstacles aforesaid, rendered the same hazardous and dangerous to said employees, in the use of said way or space. (R. 3-6.)

It was further alleged that vines, weeds and grass had been permitted to grow over and cover the ground in said way, works and space; that weeds, grasses and vines in said space had been cut by defendants and accumulated into piles, where they had been permitted to remain for such time that other grasses had sprouted under and grown through said piles, anchoring them, so that they would hold against pressure, and become more dangerous obstacles to the use of said way by said employees, and likely to engage and hold their feet, and cause them to stumble and fall while engaged in their duties. (R. 4.)

It was further alleged that respondent, for a long time before said 2nd day of August, 1945, maintained what is known as a stock-guard across the entire width of its roadbed and roadway at said point, including the way, works or space between the tracks, where the same was required to be crossed and passed over by its employees engaged in the operation of its trains, as was deceased. It described the part of the stock-guard lying between the tracks as extending entirely across the area or way, and as being 7 or 8 feet long, and composed of sharp triangular spikes or spines. That respondent had permitted weeds, grasses and vines to grow into and through, and completely cover said stock-guard, so that it was completely concealed as well by day as by night, and was not discoverable by one using said way or space, as was the deceased (R. 5); and that while Alfred G. Benson was engaged in his duties (which were set out), he stepped or stumbled upon and into said cattle-guard, and was thrown and caused to fall upon the same, or upon some other cutting and crushing object, the nature of which could not be alleged, and was killed. (R. 6.)

Each and all of the acts of negligence, it was alleged, jointly and severally, proximately caused and contributed to cause, the death of the deceased. (R. 3.)

There was no objection to Issue No. 2, as being too general, or as not presenting the issue pleaded, nor was there any objection or exception by either of the parties, which was reserved upon appeal, as to the form or substance or the applicability of any issue submitted.

Respondent's answer consisted of denials of all of the acts of negligence alleged; affirmatively pleaded facts with reference to the origin and movement of the train in question; alleged that deceased had finished his duty of inspection long before the eastbound train arrived, and that his only remaining duty was to get and keep himself in the clear, and in a place of safety in which safely to wait until the eastbound train had passed, and if he was injured it was on account of his own failure to use ordinary care for his own safety, and not due to any want of care on the part of respondent.

That if mistaken in the foregoing allegation, then that deceased's death was due to an unavoidable accident.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED

1. The error of the state court in refusing to reverse the judgment of the trial court and in refusing to enter judgment in favor of petitioner, upon the verdict of the jury, for $22,218.00, said amount being sixty (60%) per cent of the total damage of $37,030.00, found by the jury, the jury having found that respondent's negligence contributed and concurred to cause the death of decedent to the extent of sixty per cent (60%) of the total negligence.

2. The error of the state court in holding that the trial court was authorized to enter a judgment in favor of respondent upon the verdict of the jury.

3. The case having been pleaded, tried and submitted to the jury as a case under the Federal Employers Liability Act, and controlled by the doctrine of comparative negligence, the state court abandoned the theory upon which it was tried, and erroneously considered it as a case of common law negligence and contributory negligence, and thus denied petitioner the benefit of the Federal statute.

4. The case being pleaded and tried and submitted to the jury as controlled by the Federal Employers Liability Act and the doctrine of comparative negligence, and the court being under the duty so to submit it, Issue No. 12 cannot be construed otherwise than as presenting that issue, and the state court erred in construing said Issue No. 12 as a conditional issue, which was rendered meaningless and eliminated by the jury's answer to Special Issue No. 3.

5. (Alternative). If Special Issue No. 3 and Special Issue No. 12 are held not to be harmonious, but in conflict, then the conflict is irreconcilable, and the state court should have reversed and remanded the case.

6. The error of the state court in holding that there was no record testimony of probative force in support of petitioner's contention that the deceased's fatal injuries were attributable in anywise to respondent's stock-guard, whether negligently maintained or not.

Argument and Authorities

Under the first assignment we respectfully submit:

The verdict of the jury, as reflected by their answers, was in favor of petitioner, and under the answers she was

entitled to have judgment entered in her favor for $22,-218.00.

The Texas Rules of Civil Procedure do not provide for a general verdict, but the verdict of the jury is reflected by their answers to the issues submitted to them. *Rules 290, 293, 300, 301 T. R. C. (Franki.)*

The court's charge must be construed as a whole, each part in the light of every other part, and the words employed are to receive their usual meaning in common parlance. *Speer's Law of Special Issues, 1932, page 170, Section 118.* Provided, of course, a word which in the charge, itself, is given a particular meaning will, of necessity, be so construed. Id. It is further elementary that it must be construed, where construction is necessary, in the light of the pleadings and the evidence. Id. This is but the application of the familiar rule of construction that the instrument will be construed in the light of the circumstances surrounding its execution. Like our statutes, themselves, the charge to be construed is to be construed liberally, with a view of accomplishing its purposes, to-wit, to aid the jury in finding the facts for which the court calls.

There is this, however. The charge is exclusively for the jury, composed of ordinary men, unlearned in the law and the rules of legal construction, and it should receive such construction as such men would most likely give to it. Id. pages 170-171.

Foremost, perhaps, of the general rules (of construction) is that the individual issue is to be construed according to the ordinary import of the words used, in the light of the

pleading upon which it is based, and in the light of the evidence that has been heard to support or overthrow it. Closely following this, is the rule that the issues as a whole are to be construed with reference to every other, so that all may stand separately and collectively, and that there will be no unseemly conflict or destruction of parts whatsoever, and, furthermore, of course, each issue will be construed in the light of the entire instructions, explanations or definitions accompanying the issues. * * *

If an issue is capable of two interpretations, one of which will render it in conflict with another issue in the case, or will render it meaningless for any reason, as for immateriality, and the other interpretation will not be open to that or any similar vice, that interpretation which will forbid the evil consequences should be adopted. *Speer's Law of Special Issues, 1932, pp. 267-268, Section 208.* * * *

The qualification of the general rule of construction peculiar to charges is that the study is to be from the standpoint of the jurors—men of ordinary intelligence, unlearned in the law. This is but the application of the general rule that the position of the parties is worthy of consideration. *Speer's Law of Special Issues, page 269, Section 208.*

We have quoted at considerable length from Judge Speer because he is recognized as an able lawyer, an experienced appellate judge, and because he is the author of a work especially dealing with special issues, the form of charge in general use in this state for many years.

The same ideas are expressed in the decisions and in other works. See *24 Tex. Jur. 625, Section 133, and authorities cited.*

> "* * * the charges should be read in the light of the pleadings and evidence. The reviewing court should not, it has been said, look at the instructions from the standpoint of trained lawyers, but rather from that of jurors who are untrained in the law. The language employed should be given the common-sense meaning it was intended to convey; it should not be accorded a strained and unusual construction. The words employed are to be taken in their ordinary and popular acceptation." Section 133.

It is further said in Section 134 that:

> "No principle of the law of instructions is better settled than that which requires the entire charge to be looked to in every case in order to determine the validity of an objection to any portion. This means that the charge should be construed as a whole—a doctrine that has been rendered in a host of cases."

Again (page 627):

> "Each portion of a charge is equally important and binding. In determining their correctness, the general charge and the special charges given at the request of counsel should be considered together" and (page 628) "instructions are not to be considered abstractly. On the contrary, upon review, the charge should be considered and applied in the light of the pleadings and the evidence.
>
> " 'The charge must be construed as a whole and in the light of the facts and circumstances before the court and jury, and not in the light of a supposed state of facts not raised by the evidence'." *Magnolia Petroleum Company v. Johnson, 176 S. W. (2d) 774 (Civ. App.), 779, syllabi 11-12.*

Citations could be multiplied indefinitely. And this is the general rule. *53 Am. Jur. 757, Section 1093; 64 C. J. 960, Sec. 747,* and authorities there cited.

The facts supporting the verdict of the jury may be gathered from any number of the findings, as in the case of *Louisville, etc. Ry. Co. v. Lynch (Ind.), 34 L. R. A. 293,* where it is said:

> "It is objected that the special verdict did not find that the explosion was the result of the defects in the locomotive found by the jury. It is found that at the time of the explosion and for four weeks prior thereto, there had been 45 broken bolts in the first sheet; that the broken bolts gave no support or strength to the boiler, thereby rendering said boiler insufficient to resist the pressure of steam therein, and was dangerous. That the explosion occurred in that part of the boiler where such broken bolts were located. It is true that these facts are gathered from several of the findings, but there is no requirement that they should have been stated in logical or consecutive order, and it is our duty to consider the findings of the verdict in their entirety and not in fragmentary parts. The facts so found raise the irresistible inference that the broken bolts, with the use of the locomotive, caused the explosion." (Column 1.)

Assuming for the purpose of argument, that there is uncertaintly, other than that imported into the finding by the state court, and that construction or interpretation is necessary, and viewing and interpreting them according to the rules laid down above, what is the effect of the jury's findings and verdict?

1. They found that *at the time of his death* deceased *was in the performance of his duties* in connection with the operation and movement of the westbound train.

2. They found that respondent, its agents or servants, were guilty of negligence in the manner of laying out and maintaining its main line and passing track and the area between the same *where the deceased, Alfred G. Benson, was performing his said duties.*

3. They found that the negligence of respondent was not "the direct and proximate cause of the death" of deceased.

4. They found that deceased failed to place himself in a place of safety at the time of his death; that such failure to be in a place of safety at the time he met his death was negligence, and that such negligence was *a proximate cause* or *a proximate contributing cause* of his death.

5. They found also that *in being between the main track and the passing track at the time of his death* was not negligence.

6. They found that his death was not due to a new and independent cause.

7. They found that his death was not the result of an unavoidable accident.

8. They found that negligence upon the part of the defendant *proximately contributed* to cause the death of the deceased to the extent of sixty (60%) per cent of the total negligence.

The state court, by its rule of construction, has "looked at the instructions from the standpoint of trained lawyers," and not from that of jurors who are untrained in the law. It has given them a "strained and unusual construction"

instead of taking the words "in their ordinary and popular acceptation."

The direct and proximate cause means the cause which is sufficient, within and of itself, and without the concurrence or contribution of any other cause, to produce the result. It means "in ordinary language and according to ordinary understanding; the sole cause:" *Webster's Dictionary; Century Dictionary; El Paso Electric Company v. Sawyer, 291 S. W. 667-673, col. 1, syllabus 8; affirmed by the Supreme Court, 398 S. W. 267; Wastl v. Union Ry. Co. (Ia.), 61 P. 9; Leary v. Anaconda Copper Co. (Mont.), 92 P. 477; Rockwell v. Grand Trunk Ry. Co. (Mich.), 234 N. W. 159.*

"Direct and proximate cause" in the definition given by the trial court in the preamble to the charge, does not submit—it excludes—concurring and contributing cause. "The direct and proximate cause" means "the sole cause," according to the understanding of the common man.

The child in the sixth grade, when he first meets the parts of speech, learns that "the" is the definite article, and "has a specifying and particularizing force, as opposed to the indefinite article 'a';" and excludes the idea of any other concurring cause." *Wastl v. Ry. Co., 61 P. 9.*

Here, as in the *Wastl case*, "the indefinite 'a', used in place of it, would have meant one or one of the class or in this instance, one of two contributing causes."

The jury may be assumed to have had a sixth grade education or better, and if they did, they encountered no difficulty in understanding the language of the charge.

We are reminded here that the state court mentioned that there was no objection by petitioner to this charge, and implied, apparently, that one should have been made. No objection was necessary or pertinent. The charge, when considered in connection with Issue No. 12, was proper, and contemplated the nature of the case. It may be said, however, that if answered in the affirmative, there would have been no diminution of the damage, since it would have excluded the idea of any contributory negligence or any contribution by deceased to the cause of his death; and in that event doubtless the jury would have answered Issues Nos. 5, 6 and 7 in the negative.

This jury, composed of men of common education and common understanding, had before it the whole charge. Finding that respondent was guilty of negligence in the manner of constructing and maintaining the place where it found the deceased was engaged in the performance of his duties, it also found that he himself, was guilty of negligence, which was *a* proximate cause or a *proximate contributing* cause of his death. So that having found that there was negligence upon the part of respondent, but that it was not the direct and proximate cause of the death of deceased, when asked this question "What percentage of negligence, if you have found such negligence on the part of defendant, proximately contributed to the cause of the death of deceased," they answered sixty (60%) per cent. *U. P. Ry. Co. v. Hadley, 246 U. S. 330-335, 62 L. Ed. 751.*

The only condition concerning this issue is contained in the issue itself "if you have found such negligence on the part of the defendant."

Not only will it be presumed that the jury understood the language of submission, but that they obeyed the instruction of the court with reference to the issues submitted.

Gillette Motor Transport Co. v. Whitfield (Tex. Sup. Ct.), 200 S. W. (2d) 624-626;
Armour & Co. v. Tomlin, 42 S. W. (2d) 634-637;
Russell v. Martin, 49 S. W. (2d) 699-700;
3 Tex. Jur. Section 745, page 1057;
3 Am. Jur. Section 951, page 513;
Corpus Juris, Vol. 4, 771, Sec. 2717.

In the case first cited, *Gillette Motor Transport Co. v. Whitfield*, the trial court had, in effect, instructed the jury that in considering the case they could take into account matters within their common knowledge. Chief Justice Alexander, in passing upon this question (page 626, col. 1) says:

> "But in this case there is no showing that the jury discussed any matters not within the rule of 'common knowledge.' The instruction complained of contained a correct statement of the law. Presumably, the jury understood and followed the instructions of the court;" (citing a number of authorities, including *3 Am. Jur.* and *3 Tex. Jur.)* "and if so, they considered only that which it was proper for them to consider, and the defendant suffered no injury. We cannot presume that the jury misunderstood and misapplied the court's instructions and considered matters which it should not have considered, and then base a reversal upon such an unsupported presumption."

If the jury were of common understanding, and if they followed and accepted the instruction of the court, they must have found that each of the parties was "negligently

responsible," and that their concurring and contributing negligence resulted in the death of deceased in the proportion of sixty (60%) per cent on the part of respondent and forty (40%) per cent on the part of deceased.

But the state court says that Issue No. 12 was a conditional issue, to be answered only in case of an affirmative answer to Issue No. 3.

There is nothing in any part of the charge and no theory of the case which makes it conditional upon such affirmative answer. See *41 Tex. Jur. 1128, Section 285:*

> "An issue is submitted conditionally when the jury are instructed that their answer is to be made conditional on an affirmative or negative answer to other issues."

Moreover, to say that it is thus conditioned is to abandon, as petitioner claims the state court did abandon, the whole theory of her case. Issue No. 12, or a similar issue, was necessary to present the issue of comparative negligence; it was recognized as a proper issue by respondent, and was in the exact language of its requested Issue No. 8, and it cannot now be contended that it was conditioned upon an affirmative answer to Issue No. 3.

In support of its reasoning that Issue No. 12 was a dependent issue, the state court assumes a condition which does not exist, and reaches a conclusion on a premise not in the record.

> "Standing alone," it is said, "the jury's answer to Issue No. 12 is a general finding not based on any specific act or omission on the part of defendant having a causal connection with the deceased's death." (See page 332, Col. 2, syllabi 2-3.)

But Issue No. 12 was not "standing alone." Issue No. 12 was an integral part of the whole charge, presenting a theory inseparable from the case pleaded, and not covered by any other charge, and it related to the negligence of both parties, as found by the jury, and the apportionment of negligence, a question arising only in the event of concurring and contributing negligence. It had no place in the charge if it did not have reference to that theory of the case.

It was not general; it was specific. It related not to Issue No. 3, which did not submit any question of negligence, but only of proximate cause, but to Issue No. 2, which established defendant's negligence, and Issues Nos. 5, 6 and 7, which established the negligence of deceased.

Under the very terms and definitions used by the court, the jury correctly interpreted its language. "Proximate cause" was defined by the court as being "a cause which, in its natural and continuous sequence, unbroken by any new independent cause, produces a result which would not have occurred but for such cause." In Issue No. 12 the court defines his expression "proximately contributed to cause," and told the jury that the term meant "a concurrent act or acts of negligence on the part of both the deceased and the defendant."

This interpretation by the state court violates a cardinal rule laid down by Judge Speer in his *Law of Special Issues, 1932, pp. 267-268, Section 208*, quoted supra, which is that:

> "If the issue is capable of two interpretations, one of which * * * will render it meaningless for any reason, as for immateriality, and the other interpretation will not be open to that or any similar vice, that

interpretation which will forbid the evil consequence should be adopted."

It will not be presumed that the trial court did not undertake to submit the question of comparative negligence by this issue, and respondent cannot complain of it either as to its generality or its applicability, since it is in its own language.

On the question presented by this record we invite the court's attention to the case of *Spokane, etc. Ry. Co. v. Campbell, 217 F. 518-524*, where the question presented here is considered by the Circuit Court. It is said:

> "This act (the Employers Liability Act) provides, among other things, that in case of injury or death to an employee contributing negligence on the part of the employee shall not bar a recovery, but that the damage shall be diminished in proportion to the amount of negligence attributable to such employee, and further that no such employee shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of the employee contributed to the injury or death of such employee. The effect of this statute is to eliminate *the element of proximate cause where concurring acts of the employer and the employee contribute as a cause for the injury or death of the employee.* And especially where the contributing act of the employer was in derogation of a duty imposed under the act for the safety of the employee."

The judgment in this case was affirmed by this court in *241 U. S. 495, 60 L. Ed. 1125*, where it is said (page 1136):

> "The Circuit Court of Appeals held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this except

that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause, but where, as in this case, the plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employers Liability Act requires the former to be disregarded."

It would seem that there is no difference, in principle, between a case involving a defective or insufficient equipment *(Section 51, page 118, 45 U. S. C. A.)* and where the negligence *(proviso in Section 53, page 610, 45 U. S. C. A.)* is per se, and a case which applies the same rule with reference to contributory negligence as respects "track, roadbed, works, boats, wharves or other equipment" and where the negligence is found by the jury, as by Section 53 it is the negligence of the defendant and contributing negligence of plaintiff which determine the applicable rule in either case.

The South Carolina case of *Wragge v. S. C. etc. Ry. Co.* reported in *33 L. R. A. at page 191*, very clearly distinguishes between the meaning of "proximate cause" and "contributing cause." We especially invite the court's attention to the discussion of these terms beginning at page 197, column 2.

PROPOSITION UNDER ASSIGNMENT NO. 2

The verdict of the jury, as reflected by its special findings, did not authorize or permit either the trial court or the state court to enter a judgment in favor of respondent thereon, and each of said courts was without author-

ity to substitute its own findings for those of the jury, and thereupon to enter such judgment.

Argument

The findings of the jury constitute their verdict which, as between the parties, is conclusive as to the facts found. *Rule 290, Texas Rules of Civil Procedure. (Franki.)*

Where a special verdict is rendered * * * the court shall render judgment thereon, unless set aside or a new trial is granted or judgment is rendered, notwithstanding verdict or jury finding under the rules. *Rule 300.*

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or in equity. Provided that upon motion and reasonable notice, the court may enter judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any special issue jury finding that has no support in the evidence. *Rule 301.*

There was no motion by respondent for a judgment non obstante veredicto, and there was no motion by it to set aside any finding as not supported by the evidence.

The respondent's motion was for judgment on the findings (R. 43), and not otherwise. Respondent accepted the verdict of the jury as reflected in its findings upon the theory of the case as it was presented to the jury, and admitted that the evidence raised every issue submitted. *3 Tex. Jur. 1030; Fire Ass'n v. Moss, 272 S. W. 555; Whitehead v. Reiger, 6 S. W. (2d) 745.*

The authorities which we have submitted under the preceding proposition as requiring the court to enter a judgment in favor of petitioner apply equally to the proposition that the court was without authority to enter a judgment in favor of respondent.

PROPOSITION UNDER ASSIGNMENT NO. 3

Where a case has been pleaded, tried and submitted under one theory, neither of the parties, upon appeal, will be heard to present it upon another theory or to repudiate the theory upon which it was tried.

3 Am. Jur. 419, Section 873; 3 Tex. Jur. 1005, Section 718, and authorities there cited; *3 Tex. Jur. 168, Section 111*, and authorities cited.

> "It is an established principle of appellate procedure that the parties are restricted to the theory on which the case was tried in the lower court. * * * Applying this rule, it is held that where the case is submitted and determined by the trial court on certain issues, the appellate court will not consider it on a theory which would make all such issues immaterial."

Section 112, page 170:

> "Where the parties try a case in the lower court on the theory that the pleadings are sufficient to raise a certain issue, and the pleadings are subject to such construction, the party whose duty it was to object may not be heard to say on appeal that such issue was not properly raised in the trial court."

Section 114:

> "The parties on appeal may not present a theory in regard to defenses different from that interposed in the trial court by proper pleading and proof."

Special Issue No. 12, as prepared by respondent and adopted and submitted by the court, permitted the jury to find that the contributing negligence of respondent was one hundred per cent or no per cent or sixty per cent, as found. It submitted the rights of petitioner under the Federal Employers Liability Act, and whether in words happily or unhappily chosen, in words selected by respondent for the submission of that issue.

When the state court says that this issue is dependent or conditional, it abandons the theory of the case as tried, and throws out petitioner's entire claim and all of her rights as pleaded, presented and recognized in the trial court.

PROPOSITION UNDER ASSIGNMENT NO. 4

Since every issue is construed according to its own language, and in view of other issues, and the nature of the case, and since Issue No. 12 was a pertinent submission of comparative negligence, not elsewhere submitted, and recognized by the parties as a sufficient submission of that issue, the state court had no authority to change the entire theory of the case, and consider said issue as a dependant issue, thus holding that the theory of comparaative negligence was not in fact submitted.

Argument and Authorities

In addition to the argument and authorities which we offer as applicable to this proposition, and in addition to the authorities with reference to the proper construction of the instructions and answers offered above, we submit:

1. It was the duty of the trial court to submit the issue of comparative negligence which was presented by the pleadings and raised by the evidence.

2. It will not be presumed that he refused to perform this duty; but rather

3. That he did perform this duty, intended so to do by the submission of Issue No. 12, and thereby sufficiently presented the issue of comparative negligence.

ALTERNATIVE ASSIGNMENT NO. 5
A PROPOSITION

If Special Issue No. 3 and Special Issue No. 12 are held not to be harmonious, but in conflict, then the conflict is irreconcilable, and the state court should have reversed and remanded the case.

Argument and Authorities

It is elementary that in a case submitted to the jury upon special issues, if two of the issues requiring findings of ultimate and necessary facts are in conflict, they are mutually destructive and cannot form the basis of a judgment. *Texas Law Review, Vol. XIV, page 279*, where it is said:

> "A judgment cannot be entered for either party where answers to material special issues are contradictory and conflicting." [*Citing Price v. Seiger, et al. (Com. App.), 49 S. W. (2d) 729; Texas Indemnity Ins. Co. v. Barker, 82 S. W. (2d) 389; Muckleroy v. Motor Co., 33 S. W. (2d) 260*, and *Stephens Company v. Novice State Bank, 2 S. W. (2d) 419.*]

PROPOSITION UNDER ASSIGNMENT NO. 6

The evidence was sufficient under the decisions of this court to authorize a verdict for petitioner, and to form the basis for a judgment in her favor.

Argument and Authorities

The petitioner's case rested upon circumstantial evidence.

The evidence relating to the death of the deceased, and the circumstances surrounding it, appears in the Record, pages 16 to 31.

Although the body of deceased bore other evidences of injury (R. 25-26), the wound which caused his death (R. 26) was a "penetrating and crushing injury, right parietal region." As described by petitioner (R. 21), there was a cut in his temple, just to the rear of the right eye, about an inch long.

The construction of the part of the stock-guard in the main track and that part in the area between the main track and the side track is shown to be of different types, that in the main track being thin, smooth steel bars, parallel with the rails, and that in the areaway appearing as a nest of spines or spikes, extending upward (R. 78, Exhibit 15, taken after the grass and weeds had been cut, R. 21). This type occupied the entire distance between the main line and the passing track, and was 8 feet, 7 inches long, that is, from east to west. (R. 20.)

This area was covered with grass from knee-high to waist-high, and there were vines, the witness would call them gourd vines, all over the different places, and other vines. There were piles of dead grass, and the grass had come up between like they had been there for some time. The grass had grown up through those piles; the ground was ridged and uneven. (R. 21-22.)

A view of the area, beginning with the camera placed at a point just west of the west switch target, and eastward at intervals of 50 steps, is shown as Exhibits 3 to 7, inclusive. (R. 76.) Identified by the witness Moore. (R. 22.) Exhibits 11, 12, 13 and 14 (R. 77) show pictures of petitioner taken from different angles as she stood within the stock-guard before the grass was cut. (R. 21.)

Petitioner was at the place of the accident and in the area described, on the 5th of September, following her husband's death. She said the area between the main line and the passing track was grown up with weeds, grass and vines, from knee-high to waist-high, completely covering the ground. That she walked from the gravel road to the stock-guard (458 feet, as measured by her), looking carefully as she walked, and did not discover the cattle-guard until she stepped into it, not knowing of its existence until that time. That it was completely covered with grass. (R. 20-21.)

The conditions depicted here were not materially different on the 2nd day of October, 1945, from what they were at the time of the accident. (R. 27-28.)

There is a public road, referred to by the witnesses as the gravel road, crossing both tracks at right angles, at a point 458 feet east of the stock-guard. (R. 20.)

It was undisputed that decedent's train, No. 372, westbound, was under an order to take the siding at the station of Lindsay, and there wait for an eastbound train, No. 381; that decedent's train reached the east switch points at 2:30 a. m. (August 2), deceased opening or lining the switch for that purpose, and moved forward to a position east of the west switch target, when it came to a stop across the public road, referred to as the gravel road.

The witnesses are not wholly in agreement as to the exact position when the engine stopped.

Stitzel, the engineer of deceased's train, testified that he stopped about two car lengths east of the clearing point, which was indicated by a white tie, and that a car length is about 45 feet. (R. 20.)

Wagner, the conductor, testified that it stopped 300 to 325 feet east of the west switch point (R. 27); and Busby, the fireman, testified that it stopped approximately three car lengths in the clear. (R. 29.)

Respondent, in its pleading, alleged that it stopped some 300 feet to the east of the west end of the passing track. (R. 10.) The main line and the passing track run substantially east and west, and are straight throughout and beyond the entire length of the passing track. (R. 62.)

It was undisputed, and respondent pleaded (R. 10), that decedent's train was to wait until 3:15 for the eastbound

train 381, and that said eastbound train arrived at the passing point at exactly 3:15.

When the westbound train came to a stop on the siding, and during the time of its waiting, it occupied and stood across a public road, contrary to the rules of the company and in violation of law, which prohibited the train from occupying a crossing more than five minutes, and required its cutting in case of the use of the highway at the crossing by a member of the public. (R. 65.) When a train does stop across a public road, it is the continuing duty of all of the persons in charge of the train to take note of any passing, or any possible passing, on that road, so as to be at all times ready to cut the train if someone wishes to use the crossing. (R. 65.)

Upon the stopping of the westbound train, it was the duty of the brakemen and conductor to inspect the same—to examine the wheels, the running gear, and so forth. (R. 18.)

When the westbound train stopped on the siding, McNeil, the rear brakeman, and the conductor dismounted from the caboose, and walked westward toward the engine, inspecting the train, as was their duty. (R. 18.) About one-fourth of the way of the train from the engine they met deceased making a like inspection. All three then turned and walked westward to the engine. The conductor climbed into the cab; McNeil and deceased sat down on the south rail of the main line and talked and smoked cigarettes (R. 18) and fought mosquitoes (R. 11, respondent's answer) until about fifteen minutes before the east-

bound train was due, when McNeil got up into the cabin, which is a place on the engine tender reserved for brakemen, leaving deceased in his position on the rail of the main line. (R. 18.)

The last time McNeil saw deceased, and as far as is disclosed by the testimony, the last time he was seen alive he was sitting on this rail opposite the engine, which was about two car lengths east of the clearing point, the position of the witness and the deceased being about two and a half car lengths east of said point. (R. 18.) Thus all of the crew except deceased were in the cab of the engine or in the cabin on the tender when the eastbound train arrived.

Upon the passing of the eastbound train the engineer of the westbound train moved forward a distance estimated at from a half car length (R. 28) to a car length, or a little better (R. 19), approximately 60 feet, according to the estimate of Stitzel, the engineer. (R. 20.)

Not seeing the head brakeman, Stitzel inquired about him, and stopped his engine after this short movement.

A search was made for the deceased, and the evidence is undisputed that his body was found in the areaway between the two tracks. It was in a crumpled position, the shoulder lying under the edge of a car of the westbound train. (R. 26.)

The right shoe of the deceased was introduced in evidence as plaintiff's Exhibit 20, and showed that the heel and sole, to which the heel was attached, were torn loose from the upper part. It was tacked on with about eighteen

pegs, and would take considerable force to pull it loose. If a man stepped into the stock-guard (Exhibit 15), and fell to one side, the pressure would be on the side, the pull would be to the side, and would exercise pressure on the heel, if it was wedged in the cattle-guard. (R. 25.)

If there was no support under the steel slab with the triangular spines, and a man weighing 175 pounds, should step into it, it would have a tendency to sway or depress under his weight. (R. 25.)

The trousers of the deceased were identified by petitioner. They were cut into strips, as with a sharp instrument, from the waistband to a point opposite the thigh.

There was no thing within the area where deceased was at any time shown to have been of a nature to catch and hold his foot and to wrench the heel from the shoe or to cut his trousers into strips, as they were shown to have been cut, except the stock-guard.

Not only is it shown by the testimony of respondent's witness that if a man weighing 175 pounds should step or stumble into this stock-guard, his weight would depress the slabs composing it, but it is obvious, from an inspection of the exhibit; and equally obvious, that depressing it would pull the spines or spikes or knives inward so as to clamp and hold the heel.

Likewise, it is obvious that if a man should fall upon said stock-guard, and his body should be pulled therefrom, it would be inevitable that his clothing would be cut as the

trousers of deceased were cut; and we reiterate that no other thing was found capable of accomplishing that result.

The deceased is shown without dispute, and indeed the fact is pleaded by respondent, that he was an experienced railroad man; that he had read and understood the orders with reference to the meeting and passing of the two trains; that his hearing and eyesight were good; that he was sober, and in possession of all of his faculties, and alert. A rule of the company with which deceased as an experienced railroad man is presumed to have been familiar (R. 22), provided that when practicable freight trains must get a proceed signal from the rear end before passing any station or side track that is designated on the time-table; that this station was so designated.

It was undisputed that the eastbound train whistled for the station one long blast and for the road crossing, four blasts.

The headlight of said train was sufficiently powerful to show an object down the track for half-mile or more. The engine had a loud whistle, the engineer was working his throttle as he came around the curve at Lindsay, making a pretty good noise, and there was the noise of 57 cars. (R. 30.)

The brake beam on a box car, the center of it, is approximately 18 inches above the rail, or less. The journal box is outside the wheel, outside the rail, and about the ends of the ties. It is rounded underneath and the center is about 16 inches above the rail. (R. 66.)

Respondent's witness Winkle, superintendent of safety and rules for respondent, was asked "Suppose the grass had been cut and accumulated into piles, and Johnson grass and weeds had grown up through those piles and anchored them on the ground, would you consider that a safe passageway?" answered "Not if there was something that would cause a stumbling hazard."

It is submitted that these facts and circumstances were sufficient to take the case to the jury, and to sustain the theory of petitioner, that the deceased, while in the performance of his duty in the way between the main track and the passing track, stepped or stumbled into the cattle-guard, which caught and held his foot, and that he fell upon the same, receiving the fatal cut and crushing injury in the right parietal region, and was carried westward from the cattle-guard by the journal or brake beam on his own train, in its short forward movement, his body being left under a box car outside the rail,

Ellis v. Union Pacific R. R. Co., Law Edition, Vol. 91, No. 7;

Lavender v. Kurn, 327 U. S. 646, 90 L. Ed. 916;

Bailey v. Central of Vermont Ry. Co., 319 U. S. 350, 87 L. Ed. 1444;

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, 88 L. Ed. 520-525;

Tiller v. Atlantic Coast Ry. Co., 318 U. S. 54, 87 L. Ed. 610;

Texas authorities: Houston Natural Gas Co. v. Kluck (Sup. Ct.), 163 S. W. (2d) 618;

Henwood v. Neil, 198 S. W. (2d) 125;

Pounds v. Minter (Commission of Appeals), 13 S. W. (2d) 351;

Kansas City Southern R. Co. v. Chandler, 192 S. W. (2d) 304.

and support the verdict of the jury entitling petitioner to a judgment in the sum of $22,218.00

An opposite theory is presented by the state court which we shall here consider, and in that connection the obvious confusion of the state court as respects the facts shown and their appraisal and significance. In the first part of its opinion the state court finds that the distance from the west end of the cattle-guard to the "clearing point" is 153 feet, and from that point westward to the switch target or switch points 213 feet, making a total distance from the west end of the cattle-guard to the switch target 366 feet.

Taking this total distance and applying it to the testimony of Stitzel, who said that the body was about two car lengths east of where he first stopped his engine, that is, two car lengths east of a point 300 feet east of the west switch point, it must have been in the immediate vicinity of the stock-guard. *So found by the state court* (R. 48); but it rejects Stitzel's testimony.

Applying this distance to the testimony of the other witnesses who said that the body was found two or three car lengths east of the engine when it was brought to a stop after its first forward movement, it was in the immediate vicinity of the stock-guard.

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lengths east of the engine when it was brought to a stop after its first forward movement, it was in the immediate vicinity of the stock-guard.

Applying the distance between the stock-guard and the clearing point (153 feet) to the testimony of Stitzel, the body was in the immediate vicinity of the stock-guard.

We wish to emphasize that the position of the body, when found, is material only as determining where and how the deceased met his death.

The state court presents a theory that deceased was killed by the eastbound train, and in support of that theory changes its findings of fact as to the total distance between the stock-guard and the west switch points, and finds that the distance was 418 feet and not 366 feet.

Applying this distance to its theory it points to the fact that at a point 330 feet east of the west switch point, as testified by the witness Lytle, the grass from a point near the south rail of the main line and southeastwardly for a distance of 24 feet bore a disturbed condition. The witness Lytle, whom the court is quoting, testified that beginning at the point near the south rail of the main line and 330 feet east of the west switch "the grass had the appearance *of a heavy object having been dragged over it—mashed down,*" and that 24 feet from where this condition began it appeared that a heavy object had rested upon it for some time. (R. 23.)

It is said that the distance from the west edge of the cattle-guard to where this "disturbance ceased" was 64½ feet.

This 64½ feet added to the 24 feet where the grass was "disturbed" plus 330 feet from that point westward to the west point would seem to add up to 418 feet, found by the court in its second finding of fact, supposed to harmonize with the court's own theory that deceased was killed by the eastbound train.

In that connection it is said that "No definite measurement placed the body of deceased, when found, closer than 65 to 75 feet west of the stock-guard, Keel, the Gainesville undertaker, stating that he walked that distance and direction to reach it."

Keel, who made this estimate, also estimated the distance from the gravel road to the stock-guard, shown by actual measurement, as we have shown, to be 458 feet, as 300 to 400 yards, or 900 to 1,200 feet.

But the state court says that according to further testimony of "the couple" Lytle and Morrison, they found "a pair of work gloves, apparently placed across the south rail main track, had been cut in two, the ends lying on both sides of rail; that in the same area was a match box with matches scattered over the whole distance, a comb and pencil lying within the last 5 or 6 feet."

It is a surprising thing that the state court would base a finding that the eastbound train killed the deceased upon evidence such as this, when the record before it was that the engine had stood in the position it occupied at the time of the accident for several hours, and the witness did not know how many people had been at the point in the meantime. (R. 24.) That they did not know whose gloves it was

that were cut in two just west of the disturbed grass; did not know whether they were McNeil's gloves; did not know whether the cigarette stubs came from McNeil's cigarette package or the package of deceased, nor whether McNeil and deceased sat at this point for some time and smoked cigarettes. (R. 24-25.)

When the record showed that these articles were picked up and assembled and taken to the office of Mr. Sullivan, the claim agent, the next morning. (R. 26.)

When the record showed that Mr. Sullivan took pictures at the point of the accident of the whole track, the west end there looking east; a picture of the comb, and the witness supposed of the cigarette package, none of the articles and none of the pictures being produced in court, and none being identified as belonging to deceased.

It is further said (page 241, col. 1):

> "Keel also described the head injury, right side, as a three-cornered wound, a crushed appearance, with two-by-three-inch fracture, *not a stab wound*, but seemingly the result of a blow,"

contrary to the record, where he testified (R. 26), that he signed the death certificate, giving the cause of death as "a penetrating and crushing injury, right parietal region."

This holding is frankly stated by the court "notwithstanding the testimony of Engineer Glover, that some time later at Whitesboro his inspection revealed no marks on engine pilot or side, indicating contract with any object," and "all proven facts and circumstances compel the in-

ference that the deceased was struck by some portion of the passing train."

All of the facts which we have recited are brushed aside when it is said:

> "On the other hand, no inference legitimately deducible from any narrated testimony or physical facts supports plaintiff's theory of the accident, and, of course, jury findings cannot rest upon speculation and conjecture."

This, notwithstanding the statement of the court at page 237 of the reported case, column 1:

> "Upon going back to investigate, deceased was found in a dying condition between the two tracks in the neighborhood of where the engine of 381 had first stopped; as all witnesses testified except Engineer Stitzel, *whose testimony appears to place the body some two car lengths further east at or near the cattle-guard.*"

In other words, the state court rejects the positive testimony of the engineer Stitzel outright, though it was reasonable and unimpeached, and accepts as conclusive, in support of its theory, the estimate of 65 or 75 feet made by a witness whose estimate is shown by cross examination to be of little, if any, value.

There are three witnesses whose testimony cannot be impeached or gainsaid, and they are the stock-guard, the shoe and the trousers.

That Alfred G. Benson was in this stock-guard is established by these exhibits as certainly as any fact can be established.

The testimony of witnesses is based upon estimates and dependent upon recollection.

It may be colored by interest or affected by faulty recollection. Not so the stock-guard. Effectively concealed, by weeds and grass, it served as a trap and an efficient agency to catch and hold the shoe, the condition of which gives undisputable evidence that it was caught and held by that or some similar contrivance, and the evidence is conclusive that no other contrivance capable of this damage to the shoe was in that area. Likewise, nothing was in the area of a nature to cut into strips the trousers of the dead man, as with a knife, except the sharp and upstanding spines of the cattle-guard.

Glover, the engineer of the eastbound train, referring again and in this connection to the eastbound train, and the state court's theory, that train is acquitted by Glover, the engineer. There was a mile and half of straight track between the curves, east and west of the side track. Going east, the witness was sitting on the right side of the engine, looking straight ahead, watching ahead, watching his business. He did not see anyone asleep on the track; he did not see Mr. Benson. (R. 29.) He saw nothing on the track. If there had been an object as big as a man on the track, he believed he would have seen it. He saw nothing moving on or near the track as he passed Lindsay. He could see very plainly down to the beginning of the east curve, nearly two miles away. He could see well between the main track and the siding. (R. 30.) He heard no noise or outcry as he passed Train 381. (R. 30.)

We submit that the record discloses that at the time the eastbound train approached the deceased was the only member of the crew performing his duty—keeping a vigilant lookout toward the rear of his train, which was standing across a public road, so that he might give a signal for the cutting of the train, to allow passage over the track by members of the public.

That it is a fair inference that when this competent and alert employee saw the reflection of the headlight and heard the whistle of the eastbound train, seeing that all other members of the crew were on the head end of the train, he started to the rear to be in position to give the necessary signal for the movement of his train, after the passage of the eastbound train, and that while thus engaged, while in the performance of his duty between these tracks, as found by the jury, he stumbled or stepped into this stock-guard, and was fatally hurt. That the weeds and grass, shown to be between knee-high and waist-high at the stock-guard, effectually concealed him from Glover, who could see all of the area between the two tracks, and that when the westbound train made its forward movement, he was caught by the journal box on the outside of the wheels of one of the cars, and while held between that and the ends of the ties, he was dragged westward to the point where his body rested under the box car of his own train. That the shirt torn under the right shoulder and the broken shoulder and the broken ribs give evidence of this fact. *(Lavender v. Kurn, supra.)*

It is implied by the state court (page 241, top of column 2) that his death resulted not from a stab wound but from a blow.

The undisputed evidence is to the contrary. His wife testified that there was a cut in his temple, just to the rear of the right eye, about an inch long. (R. 21.) McNeil testified that a little back of his right eye he could see a spot of blood. (R. 19.) Wagner testified that when he and McNeil reached the deceased he was breathing but unconscious, and that the only mark of injury he saw was "a little mark of blood near the right side of the mouth." The undisputed evidence is that the cause of death as certified was "a *penetrating* and crushing injury, right parietal region." (R. 26.) This is the testimony of the witness Keel and the basis of the court's statement or implication that death resulted not from a stab wound, but seemingly the result of a blow. No other thing is shown of a nature to produce this sharp cutting fatal wound, about an inch long, and at the same time to have administered a crushing blow, except the stock-guard.

WHEREFORE, petitioner prays as in her petition which this brief accompanies.

Respectfully submitted,

HASSELL AND HASSELL,

By J. M. Hassell
Attorneys for Petitioner.

Charles K. Bullard
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 321

LELA MAE BENSON, ADMINISTRATRIX, *Petitioner*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Respondent*

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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AUTHORITIES

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Respondent submits that the history of this cause in the Courts of the State of Texas, as reflected on pages 1-4 of the Petition, is correct. However, in making this admission, Respondent does not agree with or admit the force of any of the argumentative statements made by Petitioner in the narration of the proceedings had in the Courts of Texas and contends that there was no error com-

mitted which in any manner deprived Petitioner of any right under the Federal Employers' Liability Act, Title 45 USCA, Section 51, et sequitur.

Respondent further submits that the opinion of the Court below (R. 45-55), reported in Volume 200 SW (2d) 223, correctly disposes of all issues in the cause and that such opinion needs no bolstering, amplification or explanation from Respondent. (In reply to statement of Petitioner upon the decision and judgment of the Court below as appears on pages 4-9 of the Petition)

REPLY TO THE PETITIONER'S STATEMENT WITH REFERENCE TO THE NATURE OF THE CASE AND SUMMARY OF THE MATTER INVOLVED

Respondent respectfully directs the attention of the Court to the fact that a reading of Petitioner's first amended original petition, upon which the cause was tried and submitted to the jury in the Trial Court (R. 1-8), does not set forth a plausible or a logical theory upon which any claim of legal liability could be based; it does not explain the manner in which the deceased met his death nor the cause of the death of the deceased. These matters are not referred to upon a question of insufficiency of the pleading, but merely to reflect that the entire record, including the pleading, is utterly devoid of any facts upon which a finding of proximate cause against Respondent could be based. This statement is made at

this point to demonstrate that a reading of such pleading still leaves the defendant and the trier of the facts in a state of doubt, uncertainty and conjecture with regard to that which it is claimed that the Respondent did or failed to do which could have caused the death of the deceased. As heretofore stated, a reading of the entire record reflects that same doubt for the reason that it establishes no facts from which a rational or logical explanation of the cause of the tragedy could be reconstructed. As will be pointed out later, even though the jury was allowed to delve into the field of conjecture, supposition and speculation, it still found no act of the Respondent which was a proximate cause.

Respondent also respectfully submits that the statement of the nature of the case appearing on pages 9-31 still leaves the cause of death and the manner in which such occurrence happened in a state of doubt, confusion and uncertainty, to such an extent that there is no reasonable or logical basis for a finding that Respondent caused his death or that in the exercise of due care it could have reasonably foreseen that he would meet his death at such time and place.

In the absence of a factual basis upon which proximate cause might be reasonably based, there is no case proved such as imposes liability and, under the decisions of this Honorable Court, the judgment of the Court below is correct. Attention is further directed to the fact that no-

where in the Petition, or in the Brief in support of same, does Petitioner attempt to demonstrate from the facts in evidence whether the deceased met his death by being struck by the eastbound Train No. 372 or the westbound train No. 381 as it pulled up approximately a car length after train 372 had passed. Likewise, no plausible explanation is made for the presence of deceased between the tracks at the time of the approach of train 372, the eastbound train, which train he and all other employees present knew was due to arrive at 3:15 A.M. The uncontroverted record reflects that deceased's presence there was contrary to the safety rule which required him to be in a position of safety upon the approach of another train. (R. 30-31)

As heretofore pointed out, even in the field of speculation, conjecture, supposition and guess work the jury found no act of negligence on the part of Respondent which proximately caused the death of deceased. (R. 35-43)

The Court below based its judgment upon two grounds:

1) The verdict of the jury which found no act of proximate cause.

2) The insufficiency of the evidence to sustain a finding of proximate cause against Respondent.

Such Court held that either ground entitled the Respondent to judgment in this cause. The situation is precisely the reverse of that which confronted the Court in

the cases cited by Petitioner. In such cases cited the Court below had set aside the verdict of the jury in favor of the petitioner. In this cause the Trial Court and the Court below held that the Respondent was entitled to judgment upon the verdict.

JURISDICTION

Respondent makes no contention that this Honorable Court cannot exercise jurisdiction over the cause; it respectfully insists that in the proper exercise of judicial discretion, such jurisdiction should not be entertained for the reason that the judgment of the Court below was in all things correct.

REPLY TO PETITIONER'S QUESTIONS PRESENTED AND REASONS RELIED UPON

(Pages 33-43 of Petition)

Respondent submits that such reasons and the questions presented do not properly reflect the record and the issues which were decided by the Court below, in that no act of negligence which was a proximate cause was found against Respondent. (R. 35-43) While the record does reflect that the jury found in answer to a general finding that sixty per cent of the negligence of Respondent proximately contributed to cause the death of deceased, such a finding became immaterial because it is controlled and wiped out by the specific findings in answer to Special

Issues Numbers 3, 13, 16, 19 and 20, (R. 35-42) which jury findings acquit the Respondent of any negligence which was a proximate cause. There is no contention that the evidence was not sufficient to support such findings of no proximate cause and, therefore, the judgment of the Court below was in all things correct, because it rendered judgment upon the controlling findings and disregarded a general finding which was unsupported by the evidence and, therefore, in no manner controlling.

REPLY TO THE BRIEF IN SUPPORT OF THE PETITION

(Appearing on pages 43-83)

In reply to that portion of the Brief styled III, beginning on page 47 thereof, Respondent again directs the attention of the Court to the entire verdict of the jury (R. 35-43), which finds no act of negligence upon the part of Respondent which proximately caused the death of the deceased. There were three issues upon the negligence of Respondent submitted to the jury. 1) In the manner of laying out and maintaining its main line and passing tracks and area between same; 2) Whether the engineer of the westbound train started said train without giving any signal or notice; 3) Whether the signal given was sufficient. The jury found that the manner of laying out and maintaining its main line and passing tracks and the area between the same was negligence,

but it found that such negligence was not the direct and proximate cause. In this connection, Respondent submits that this answer upon proximate cause was the only answer under the record which could have been given, because there was no evidence from which it could be logically inferred that the manner of laying out and maintaining the tracks caused the deceased to be on the main line track or in the area between the main line and passing tracks at the time of the approach of the eastbound train, which he knew was due to be there at 3:15 A. M. Therefore, since the jury rightfully found no responsible negligence upon the part of Respondent, the answer of the jury to a general issue upon contributory negligence, which issue was conditioned upon joint responsibility, became immaterial and of no controlling force and effect.

The undisputed record reflects that the deceased was violating a rule of safety in being between the tracks or on the main line track; therefore, as a matter of law the rule of a comparison of negligence is not applicable, even though there was any issue for the jury. In support thereof Respondent quotes from the case of *Great Northern Railway Company vs. Wiles*, 240 U.S. 444; 36 Supreme Court, 406; 60 Law Edition, 732:

> "* * * The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,

—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasuralble liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have full and an anxious sense of responsibility.

"In the present case there was nothing to extenuate Wiles's negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

Respondent wishes at this point to take issue with any inference contained in the second paragraph on page 47 to the effect that the Respondent was maintaining any character of yards at the scene of the accident. There is no such evidence in the record and the uncontradicted evidence reflects that a passing track and a main line track

were all that were maintained at the scene of the accident and that such tracks were out in the open country. In support thereof, reference is made to the photographic exhibits appearing on pages 76-80 of the Record.

REPLY TO THE SPECIFICATION OF ERRORS

(Appearing on pages 50-51 of the Brief)

Respondent respectfully requests consideration of the following Counter Points in reply to the errors specified by Petitioner and the argument and authorities submitted thereto. These Counter Points are related to each other and will, therefore, be argued together.

COUNTER POINT NO. 1

The record reflecting that there is no finding by the jury which would convict the Respondent of proximate cause, the Court below correctly and properly disregarded a general unsupported finding upon comparative contributory negligence. (In reply to all Specifications of Error appearing on pages 50-51, argued on pages 51-83 of Petitioner's Brief)

COUNTER POINT NO. 2

The record reflecting that there is not sufficient evidence to sustain a finding of proximate cause against Respondent, the judgment of the Court below was in all things correct. (In reply to all Specifications of Error

appearing on pages 50-51 of Petitioner's Brief, argued on pages 51-83 thereof)

The Court below has held that the Respondent was entitled to judgment upon two grounds: First, that the finding upon an issue which was general and uncontrolling was immaterial in view of the finding of no proximate cause; and second, there was not sufficient evidence in the record to support a finding of proximate cause and, therefore, there existed no controverted issue of fact for submission to the jury.

This Court is not concerned with the form or the manner in which the issues were submitted to the jury, since there is no requirement of a jury trial under the Constitution of the United States. It is concerned with the sufficiency of the evidence to sustain the verdict and the judgment rendered thereon. For a statement of the applicable rule, Respondent quotes from the case of *Brady v. Southern Ry. Co.*, 64 Supreme Court, 232, 234 and 235; 320 U. S. 477, 479-480; 88 Law Edition, 239 (1943):

> "* * * The weight of the evidence under the Employers' Libility Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & Atlantic R. R. v. Hughes, supra; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 45 S. Ct. 169, 170, 69 L. Ed. 419. Cf. Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; Commissioners v. Clark, 94 U. S. 279, 284, 24 L. Ed. 59. When the evidence is such that without weigh-

ing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077; Pence v. United States, 316 U. S. 332, 62 S. Ct. 1080, 86 L. Ed. 1510; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419, noted; Anderson, Adm'x, v. Smith, 226 U. S. 439, 33 S. Ct. 176, 57 L. Ed. 289; Coughran v. Bigelow, 164 U. S. 301, 307 17 S. Ct. 117, 119, 41 L. Ed. 442; Gunning v. Cooley, 281 U. S. 90, 93, 50 S. Ct. 231 232, 74 L. Ed. 720, note; Seaboard Airline Ry. v. Padgett, 236 U. S. 668, 673, 35 S. Ct. 481, 482, 59 L. Ed. 777; Parks v. Ross, 11 How. 362, 373, 13 L. Ed. 730. See IX Wigmore on Evidence, (3d ed., 1940), Paras. 2494 et seq.

An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the state Supreme Court depends upon an appraisal of the evidence and, as to this, there is a difference of opinion here. Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer."

Without admitting that there exist sufficient probative facts in the record to warrant the submission of this cause to the jury, Respondent submits that the jury has found the existence of no proximate cause; If the evidence is sufficient to sustain a finding of proximate cause, as Petitioner contends, then it is certainly sufficient to sustain a finding of no proximate cause and the one finding is as binding as the other. In support thereof Respondent quotes from two recent decisions of this Honorable Court.

Tennant v. Peoria & P. U. R. Co., 321 U. S. at pages 32, 33, 64 S. Ct. at page 411, 88 L. Ed. 520:

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458; * * *."

Lavender v. Kurn, 327 U. S. at page 653, 66 S. Ct. at page 744, 90 L. Ed. 421.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evdentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary

basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Since the jury found the existence of no proximate cause, there is no basis for a finding of sixty per cent contributing proximate cause. Until the proximate cause is established by evidence of probative force, there can be no contributing proximate cause and, as heretofore pointed out, the findings upon proximate cause destroyed the finding upon contributing proximate cause in answer to Special Issue No. 12. In this connection Respondent wishes to correct any statement in Petitioner's Brief to the effect that Special Issue No. 12 was submitted in the language requested by Respondent. The record reflects that the Trial Court refused such requested issue in the language submitted by Respondent, because Respondent requested such issue without waiving its claim that the evidence did not justify the submission of any matter or issue of fact to the jury and also its claim that in law the negligence of the deceased was the sole cause of the injury. (R. 34)

As heretofore pointed out, by the quotation on page 7 hereof from the case of *Great Northern Railway Company vs. Wiles*, 240 U. S., 444; 36 Supreme Court, 406; 60 Law Edition, 732, which case holds that contributory negligence or comparative negligence is not an issue in the cause when an employee violates a rule of safety which the rail-

road has a right in the exercise of ordinary care to expect him to obey. In this cause the only duty which rested upon the deceased was to place himself in a position of safety and certainly he was violating that rule in being between the tracks or on either the main line track or the passing track at the time of the approach of train 372, the eastbound train. Certainly the Respondent could not furnish a safe place in the path of an on-rushing train or in close proximity thereto. Especially is this true when the uncontroverted record reflects that he was performing no duty whatsoever there and had no duty to perform for over fifteen minutes prior thereto. (R. 18) Also the jury found that deceased was engaged in no specific duty after he had completed his duties with respect to an inspection of the train. (R. 42) Certainly these facts conclusively prove that the finding of negligence in laying out and maintaining the main line track, the passing track and the area in between, which negligence was not a proximate cause, also proved conclusively that such negligence could not be a contributing proximate cause to the extent of sixty per cent, or any other percentage. Such a condition could have in no manner caused or contributed to cause the deceased to be in a place where the Respondent could not in the exercise of due care have expected the deceased, to be. In other words, the condition of the tracks or the area between the same in no manner caused him to be in such place, when, in the exercise of due care, he should have been in a position of safety and had fifteen minutes in which

to get in such a position. In support thereof, Respondent cites the case of *Delaware, L. & W. Railway vs. Koske*, 279 U.S. 7; 49 Sup. Ct., 202; 73 Law Edition, 578. It was correctly held in the case of *Alabama Great Southern RR. Co. vs. Davis*, Supreme Court of Alabama, 1944, 18 So. (2d) 737; 246 Ala. 64, certiorari denied in 65 S. Ct., 676; 324 U.S. 846; 89 Law Edition, 407, that the question of contributory negligence could not be involved in the absence of an act of negligence on the part of the defendant which was a proximate cause. This rule applies to the present controversy because there are no facts upon which a finding of proximate cause could be based and also because the jury found that there was no act of Respondent which proximately caused the death of deceased. The facts in such above cited case were much more substantial and forceful towards a finding of proximate cause, but the Court held that speculation was required to determine this issue and, therefore, no basis existed. We quote from such case on page 742, as follows:

> "* * * It was a warning to stay out of danger from a back up. If Davis did not catch the signals given by Atkinson, there is no reason to find that the signal given by the engineer was not sufficient warning to him. If Davis did not hear it on account of the noise of the southbound train, the other trainmen had no way of knowing that. This same southbound train was then passing Atkinson and Cagle also, and had the same tendency to obstruct their

hearing, but they did hear it. Why should it not be sufficient for Davis?

"If Davis put himself on the track behind the train at that time, which we will not assume, he should not have done so after such warnings to him. The engineer's signal was warning to all the trainmen. If he attempted to catch the moving cars and slipped under them, this was not the proximate result of any negligence of the trainmen, so far as the evidence shows. It is difficult to imagine any other cause of his injury.

"The only question is whether proper signals were given of the intended movement. Davis was eight or ten car lengths nearer the engineer and to the engine whistle than Cagle and Atkinson, and they heard it with no better opportunity, and no one testified that it was not given in a way well understood by all trainmen. The situation simply shows a regretable incident for which the defendant is not responsible, since its duty to Davis was fully discharged.

"The affirmative charge should have been given for the defendant."

The same principles are applicable in this cause, where the deceased had at least fifteen minutes to place himself in a position of safety and failed to do so.

The Petitioner contends that the deceased was caught in the stock guard and that such instrumentality, which the Respondent was required to maintain by law, caused his death. Such contention is without evidence of any probative force to sustain it and it is contrary to the

facts in evidence. The uncontroverted evidence reflects that deceased's body was being pushed or dragged from the west towards the cattle guard for a distance of twenty-four feet and that his body was at least sixty-four and a half feet west of the cattle guard when found. (R. 24-25). The record also reflects that two gloves, which were cut in two by a passing train on the main line track, were found at a point three feet west of the beginning of the disturbance of the grass where deceased's body had apparently been dragged or pushed for twenty-four feet. (R. 23-24) The only reasonable or logical inference which can be drawn from such facts is that the tragedy was not caused by the stock guard. Just how or why it happened is a matter purely for speculation or conjecture, but certainly these facts do not prove that the stock guard, or the area between the same, caused or contributed to cause the death. Likewise, the bodily injuries which deceased suffered disprove any contention that the stock guard caused or contributed to cause his death. (R. 26) The torn shoe, the ripped trousers and shirt, which Petitioner strongly relies upon as proving such fact, can in no manner counterbalance the probative force of the above evidentiary facts; in dragging or pushing a body for twenty-four feet upon a railroad right-of-way, quite naturally trousers and shirt will be torn and ripped and also a heel on a shoe could get torn loose by its contact with the crossties or some other portion of the right-of-way. However, even if it be assumed that the deceased was in

the vicinity of the cattle guard at the time of the approach of the eastbound train, there is no explanation for his presence there or any showing with regard to any manner in which the Respondent could have foreseen that he would be present at such spot. The jury has found that he was performing no specific duty and if there was any issue of fact to be submitted to a jury, this finding is controlling and cannot be set aside.

The jury found negligence "in the manner of laying out and maintaining its main line and passing track and the area between the same * * *." (R. 37) As heretofore pointed out, it found that such negligence was not the direct and proximate cause. There is no reason advanced throughout the entire Petition and Brief as regards how, why or the exact manner in which the laying out and maintaining of the main line and the passing track and the space in between could have contributed sixty per cent, or any other percentage, as a proximate contributing cause, which caused deceased to be in between the main line track and the passing track or on the main line track, in violation of the safety rule of Respondent at the time of the approach of the eastbound train. The record does not even remotely support any theory upon which judgment could be rendered for Petitioner upon the finding in answer to Special Issue No. 12, because there are no facts to support a finding of proximate cause and, therefore, there can be no proximate contributing cause on the part of Respon-

dent. From the facts in evidence, the only logical and reasonable answer which can be given is that as a matter of law the manner of maintaining the tracks, and the area between the same, could have in no degree proximately caused the tragedy and, therefore, as a matter of law such action could not have proximately contributed to cause such tragedy. The Courts below held that Special Issue No. 12 was a general finding, which was rendered nugatory by the findings of the jury upon specific issues which found no proximate cause; and also because there was no evidence in the record to support a finding of proximate cause. Without a repetition of authorities cited by the Court below in support of its ruling to the effect that such special issue was of no force and effect. Respondent respectfully refers the Court to them. (R. 50) The Courts below were further justified in ignoring this answer of sixty per cent contributory negligence, because the evidence was insufficient to sustain such finding or, as has been previously pointed out. any finding upon proximate cause.

CONCLUSION

Respondent respectfully insists that the judgment of the Court below was in all respects correct; that Petitioner has been deprived of no right whatsoever under the Federal Employers' Liability Act, because the record reflects, without the necessity of further investigation, that the

evidence was in all respects insufficient to sustain any judgment in favor of Petitioner; that the record also reflects that the verdict upon such insufficient evidence acquitted the Respondent of any negligence which was a proximate cause; and for both of these reasons Respondent submits that the Petition should be denied and in duty bound it will ever pray.

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Of Counsel.

O. O. Touchstone, one of duly authorized and admitted Counsel for Respondent, Missouri-Kansas-Texas Railroad Company of Texas, duly certifies that he has duly delivered to J. W. Hassell, counsel for Petitioner, a true and correct copy of this Brief in Opposition to the granting of a Writ of Certiorari, at his office in the Magnolia Building, Dallas 1, Texas, prior to the filing thereof in the Supreme Court of the United States.

O. O. Touchstone

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947

No. 321

LELA MAE BENSON, ADMINISTRATRIX,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Respondent.

PETITIONER'S REPLY BRIEF

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C. K. BULLARD,
Of Counsel.

WARLICK LAW PRINTING CO., INC.—*Law Brief Printing*—Dallas, Texas—Harwood-9350

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PETITIONER'S REPLY BRIEF

May It Please the Court:

Petitioner regrets the necessity of challenging statements made in the brief for respondent at page 17, where it is said:

> "*The uncontroverted evidence reflects that deceased's body was being pushed or dragged from the west toward the cattle-guard for a distance of 24 feet.*"

And

> "*That his body was at least 64½ feet west of the cattle-guard when found.*"

1. The basis, and the only basis, for the statement that the uncontroverted evidence reflects that "deceased's body was being pushed or dragged from the west toward the cattle-guard for a distance of 24 feet," is testimony of two of respondent's witnesses, that they found the grass mashed

down for that distance, and more noticeably mashed at the end of the 24 feet.

The undisputed evidence is that the engine stood on this side track until 15 minutes after 4 o'clock; that at least four persons, the surviving members of the train crew, had walked to and fro along the train at said point, and had mounted, and dismounted from, the engine, and it is more probable, at least as probable, that the grass was mashed down by these persons, than by the body of deceased. If, as claimed, it appeared that the grass at the end of the 24 feet, and adjacent to the switch track, seemed to have been mashed down more, it is easily accounted for by the fact that this point is where these persons would converge at and about the engine. Incidentally, it is inconceivable that the mere resting of the body at any point for the time it did rest there would have made a difference in the appearance of the grass sufficient to be noticeable.

Upon this testimony as to the appearance of the grass, and nothing else, they assert that it is uncontroverted that the body was pushed or dragged from the west toward the cattle-guard, apparently in support of a theory that deceased was struck and killed by the eastbound train.

But this evidence if it may be said to have the dignity of evidence, is controverted and shown to be without substance, if it is not conclusively rebutted, by respondent's own witness, Glover, the engineer of the eastbound train, whose testimony is set out at pages 28 to 30 of the petition, and more briefly at page 81 of petitioner's brief.

It is further controverted by the fact undisputed, that there was no object at the point where the grass was mashed down, and where it is claimed deceased's body was being pushed or dragged from the west toward the cattle-guard, which could have cut his trousers into strips, as they were cut, or caught and pulled or twisted the heel from his shoe, as it was pulled or twisted. (R. 25.)

2. There is no semblance of justification or excuse for the statement that "the uncontroverted evidence reflects that the body was at least 64½ feet west of the cattle-guard when found."

Apparently, the basis for this statement is the testimony of Keel, who *estimated* the distance westward from the cattle-guard to the body as 65 or 75 feet, and the distance from the gravel road to the cattle-guard, shown to be 458 *feet*, as *300 or 400 yards*; and the testimony of Lytle and Morrison, that from the west switch point to the cattle-guard was 418 feet; that the beginning point where the grass was mashed down was 330 feet, and from that point to the point where the grass was more mashed was 24 feet, making 354 feet which, subtracted from the total distance of 418 feet, would leave 64 feet.

But the testimony of petitioner and the finding of the Court of Civil Appeals in the first part of its opinion is that the distance between the west switch point and the stock guard was, not 418 feet, but 366 feet, 52 feet less. When this 52 feet is deducted from the 64½ feet, it will be seen that it places the body 12 feet west of the stock guard, so that even without the testimony of Stitzel and the

finding of the Court of Civil Appeals as next set out, the statement that the position of the body was uncontroverted is baseless.

But the testimony of Stitzel, respondent's engineer in charge of the westbound train, places the body "at or near a cattle-guard." And his testimony is not only unimpeached, but is in harmony with the testimony of other members of the train crew, when their testimony as to distances, which are estimates, is applied to measurements on the ground. Not only so, but the Court of Civil Appeals itself finds and says in so many words that the testimony of Stitzel appears to place the body "at or near a cattle-guard." (R. 48.) *200 Southwestern Reporter, Second Series, page 237, Col. 2.*

At the bottom of page 16, referring to the cattle-guard, it is stated that respondent was required by law to maintain it.

If this suggestion is presented as a defense, it is a sufficient answer to say that there is nothing in the law which required or permitted respondent to allow this instrumentality to become overgrown and covered and concealed by weeds and grass and vines, as shown by exhibits at pages 76 and 77 of the Record, and by the testimony of petitioner at page 21, and of the witness Moore at pages 21 and 22. Thus to maintain it was negligence. *G. H. & S. A. Ry. Co. v. Slinkard (Tex. Civ. App., writ of error refused), 44 S. W. 35; Fedenberg v. Ry. Co., 114 N. Y. 582, 11 Am. St. Rep. 697, 21 N. E. 1047.*

Indeed, it may be said that the switch track should not have been located in this place, if that location made a cat-

tle-guard necessary, since the record shows it could have been located wholly east or west of either of the crossings shown. *Ford v. Chicago, etc. R. Co. (Ia.), 24 L. R. A. 657*, where it is said (syllabus):

> "A railroad company, although required by law to erect and maintain a cattle-guard at a certain point, must make it safe as a crossing for employees, if it so locates its switch yards that they are constantly required to cross it."

And where *(page 664)* it is said:

> "We may properly say that no switch yards should be so located, if it is practicable to avoid it, as to require employee, in the switching of cars, to cross and recross a cattle-guard."

At page 18 of respondent's brief it is said that the jury has found that deceased was performing no "specific" duty at the time of his death.

The duties of the deceased with reference to the westbound train began when he was called to go out with it—the first forward movement he made to serve in the traffic, and they were upon him in connection with the movement of the train from the point of origin to the point of destination. They were continuous as a matter of law, at least in the absence of an affirmative showing that he had abandoned his connection with the train en route.

North Carolina R. Co. v. Zachary, 232 U. S. 246; 58 L. Ed. 591; Lamphere v. Ore. R. Co., 196 F. 336; McKay v. Monongahela R. Co., 44 F. (2d) 150; Virginia Ry. Co. v. Early (C. C. A.), 130 F. (2d) 548; Nicholas v. Reading Co. (Pa.), 24 Atl. (2d) 63; San Pedro, etc. R. Co. v. Davide

(C. C. A.), 210 F. 870; Alabama, etc. R. Co. v. Stotzy (Ala.), 71 S. 335; Glunt v. Pa. R. Co. (Pa.), 95 A. 109 (citing Pederson v. Ry., 57 L. Ed. 1125; Ann. Cas. 1914C, 153.)

He was on the premises of respondent where he was required to be in order to perform the specific duty of cutting or assisting in the cutting of the train at the road crossing, or giving any necessary signal, and, as found by the jury in answer to Issue No. 1, which was an ultimate and controlling issue, was, at the very time of his death in the performance of his duties in connection with the operation and movement of the westbound train, upon which he was brakeman. (R. 37.)

It was not required that, in order to be protected against the negligence of respondent, he should be engaged in actually giving a signal or pulling a draw bar or in doing any other specific thing. It was enough that he was there in the performance of his duties *for the purpose* of doing one or all of these or any other specific things.

The issue as to a specific act was evidentiary and not ultimate and in any event, not of a nature to form the basis of a judgment.

WHEREFORE, petitioner prays as in her petition.

Respectfully submitted,

HASSELL & HASSELL,

By J. W. Hassell
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